Supreme Court, U.S.
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No.

# In the Supreme Court of the United States

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ALONSO ALVINO HERRERA,

*Petitioner,*

v.

STATE OF OREGON,

*Respondent.*

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**On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010), this Court held that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'"

This Court has also held that the Sixth Amendment requires a *unanimous* jury verdict to convict a person of a crime. The question presented is:

1. Whether the Sixth Amendment, as incorporated against the States by the Fourteenth, likewise requires a unanimous jury verdict to convict a person of a crime.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner, Alonso Alvino Herrera, respectfully petitions for a writ of certiorari to review the judgment of the Oregon Court of Appeals in this case.

## OPINIONS BELOW

The Oregon Court of Appeals decision, App., *infra*, p. 1a, is unreported, but relies on *State* v. *Cobb*, 198 P.3d 978 (Or. Ct. App. 2008), review denied, 213 P.3d 578 (Or. 2009). The Oregon Supreme Court decision denying review, App., *infra*, p. 3a, is unreported. The trial court issued no opinion.

## JURISDICTION

The Oregon Supreme Court denied review on June 11, 2010. App., *infra*, p. 3a. This Court has jurisdiction under 28 U.S.C. § 1257(a). See *Prune Yard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 79 (1980) ("a state constitutional provision is a 'statute' within the meaning of § 1257(2)," a then-existing provision that was analogous to the current § 1257(a)).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed * * *.

The Fourteenth Amendment to the United States Constitution provides,

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law * * *.

Article I, section 11, of the Oregon Constitution provides,

> In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; * * * provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict * * *.

## STATEMENT

1. This case presents the important and recurring question whether it is constitutional for Oregon and Louisiana, alone among the States, to allow criminal convictions by nonunanimous jury verdicts.

This Court recently reaffirmed that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *McDonald* v. *City of Chicago*, 130 S. Ct. 3020, 3035 (2010) (plurality opinion); *id.* at 3058, 3064, 3068 (Thomas, J., concurring in the judgment) (expressing the same view as to scope of incorporation), discussed *infra* p. 6, note 2. And this Court has repeatedly held that the Sixth Amendment mandates jury unanimity for federal convictions. See cases cited *infra* p. 5,

Part I. But the precedential effect of Justice Powell's concurring opinion in *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), has led to the same "two-track" "watered-down" partial incorporation of the Jury Trial Clause that this Court condemned in *McDonald*, 130 S. Ct. at 3035 & n.14 (plurality opinion).

Eight of the nine Justices who decided *Apodaca* would have treated federal and state criminal trials the same way. Four Justices would have rejected a unanimity requirement for both sorts of trials. 406 U.S. at 407–12 (plurality opinion). And four others concluded there was a unanimity requirement for both. *Id.* at 414–15 (Stewart, J., joined by Brennan and Marshall, JJ., dissenting); *id.* at 380–94 (Douglas, J., joined by Brennan and Marshall, JJ., dissenting). Only Justice Powell believed that the jury unanimity requirement, while binding on the federal government, should not be incorporated against the states. *Id.* at 377 (Powell, J., concurring in the judgment). But because Justice Powell's solo opinion dictated the result in that case—affirmance of the conviction—the Jury Trial Clause now applies differently to federal and state trials.

Two states, Louisiana and Oregon, allow nonunanimous convictions; in both, a 10-2 vote suffices to convict. LA. CONST. art. I, § 17; OR. CONST. art. I, § 11; *State* v. *Bertrand*, 6 So. 3d 738, 743 (La. 2009) (citing *Apodaca* to uphold the constitutionality of nonunanimous verdicts); *State ex rel. Smith* v. *Sawyer*, 501 P.2d 792, 793 (Or. 1972) (same).[1] And because

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[1] Though Oklahoma uses nonunanimous juries for some offenses, it should not be classified with Oregon and Louisiana for purposes of this petition's analysis. Oklahoma authorizes nonunanimous juries only for the trial of crimes that are punisha-

this Court has instructed lower courts to "leav[e] to this Court the prerogative of overruling its own decisions," *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989), state supreme courts will continue to follow *Apodaca* even though it has been undermined by *McDonald*. See *infra* Part III.

This Court should therefore intervene to decide whether criminal defendants ought to enjoy equal "enforce[ment] against the States" of the Jury Trial Clause "'according to the same standards that protect those personal rights against federal encroachment,'" *McDonald*, 130 S. Ct. at 3035, just as gun owners enjoy equal enforcement of Second Amendment rights against state and federal governments.

**2.** The prosecution argued at trial that Alonso Herrera borrowed a friend's car, and did not bring it back. 1 Tr. of Proceedings 33 (Aug. 25, 2008). Herrera was prosecuted for unauthorized use of a vehicle, OR. REV. STAT. § 164.135, and for possession of a stolen vehicle, *id.* § 819.300. Oregon Court of Appeals Excerpt of Record 2.

Before trial, Herrera's lawyer asked for a jury instruction stating that the jury had to be unanimous to render a verdict. App., *infra*, p. 4a. The court denied the request, *ibid.*, and instructed the jury that, "10 or more jurors must agree on your verdict." 1 Tr. of Proceedings 104. Herrera's attorney preserved her exception to that instruction. App., *infra*, p. 7a.

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ble by no more than six months in jail. OKLA. CONST. art. II, § 19. The Jury Trial Clause is inapplicable to such so-called "petty offenses." *Baldwin v. New York*, 399 U.S. 66, 68–69 (1970) (controlling opinion); *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937). The Clause's unanimity requirement is thus inapplicable to such offenses as well.

The jury voted 10-2 to convict on the unauthorized use charge, and 11-1 to acquit on the possession of stolen vehicle charge. App., *infra*, p. 6a. On appeal, Herrera argued that the nonunanimous jury verdict violated the Sixth and Fourteenth Amendments. App., *infra*, p. 9a. The Oregon Court of Appeals summarily affirmed, App., *infra*, p. 1a, citing *State* v. *Cobb*, 198 P.3d 978 (Or. Ct. App. 2008), review denied, 213 P.3d 578 (Or. 2009). *Cobb* in turn stated, "to the extent that defendant now invokes *Blakely* v. *Washington*, 542 U.S. 296 (2004), as overruling *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), *sub silentio*, we have previously rejected that contention. *State* v. *Bowen*, 168 P.3d 1208 (2007), *modified on recons.*, 185 P.3d 1129 (2008)." 198 P.3d at 979 (parallel citations deleted).

Herrera petitioned for review to the Oregon Supreme Court, renewing the arguments made below. App. G, *infra*, p. 14a. The Oregon Supreme Court denied review. App., *infra*, p. 3a.

## REASONS FOR GRANTING THE PETITION

### I. The Oregon Nonunanimous Jury Rule Is Inconsistent with This Court's Holding in *McDonald* v. *City of Chicago*.

Alonso Herrera was convicted by a 10-to-2 vote. Two jurors concluded that the prosecution failed to prove the case beyond a reasonable doubt.

In a federal case, such a vote would not yield a conviction, because the Sixth Amendment requires a unanimous verdict to convict. See, *e.g.*, *Andres* v. *United States*, 333 U.S. 740, 748–49 (1948); *Hawaii* v. *Mankichi*, 190 U.S. 197, 211–12 (1903); see also *Swain* v. *Alabama*, 380 U.S. 202, 211 (1965) (dic-

tum), overruled on other grounds by *Batson* v. *Kentucky*, 476 U.S. 79 (1986). But because of Justice Powell's solo controlling opinion in *Apodaca*, 406 U.S. at 369–77 (Powell, J., concurring in the judgment), the unanimous jury requirement of the Sixth Amendment is not incorporated against the states.

This is a constitutional anomaly. This Court has "abandoned 'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights.'" *McDonald*, 130 S. Ct. at 3035 (plurality opinion) (quoting *Malloy* v. *Hogan*, 378 U.S. 1, 10–11 (1964)).

Instead, this Court has concluded that "it would be 'incongruous' to apply different standards 'depending on whether the claim was asserted in a state or federal court.'" *Ibid.* This Court has "decisively held that incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment." *Ibid.*[2] For example, in holding that the

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[2] Justice Thomas's analysis on this is consistent with the plurality's. Justice Thomas concluded that the Privileges or Immunities Clause applies to the states all the "individual rights enumerated in the Constitution." *McDonald*, 130 S. Ct. at 3068 (Thomas, J., concurring in part and concurring in the judgment). He noted that "privileges" or "immunities" include "the right to a jury trial," a right that stems from "the basic liberties of English citizens." *Id.* at 3064. And in agreeing that the Fourteenth Amendment makes the Second Amendment "'fully applicable to the States,'" *id.* at 3058, he cited the passage in the plurality opinion, *id.* at 3026, that says, "We have previously held that most of the provisions of the Bill of Rights apply with full force to both the Federal Government and the States. Applying the standard that is well established in our case law, we

Double Jeopardy Clause was incorporated, this Court held that, "[o]nce it is decided that a particular Bill of Rights guarantee is 'fundamental to the American scheme of justice,' the same constitutional standards apply against both the State and Federal Governments." *Benton* v. *Maryland*, 395 U.S. 784, 795 (1969) (citation omitted); see also, *e.g.*, *Pointer* v. *Texas*, 380 U.S. 400, 406 (1965) (same, as to the Confrontation Clause); *Malloy*, 378 U.S. at 10–11 (same, as to the privilege against self-incrimination).

In *McDonald*, only one dissenting Justice argued that Bill of Rights provisions should apply differently to the states than to the federal government. 130 S. Ct. at 3092–95 (Stevens, J., dissenting). The other three dissenters also did not endorse that part of Justice Stevens' opinion. *Id.* at 3120 (Breyer, J., joined by Ginsburg and Sotomayor, JJ., dissenting) (noting agreement with some parts of Justice Stevens' opinion, but not with pp. 3092–95). And both the plurality and Justice Thomas rejected Justice Stevens' argument, in the course of reaching their conclusion that the Second Amendment fully applies to state and local governments.

The plurality opinion in *McDonald* did note "one exception to this general rule" that fundamental rights are fully incorporated against the states: "The Court has held that although the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials, it does not require a unanimous jury verdict in state criminal trials." *Id.* at 3035 n.14 (citing *Apodaca*).

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hold that the Second Amendment right is fully applicable to the States."

But the plurality opinion stressed that the *Apodaca* result was not compatible with *McDonald*'s rejection of "the two-track approach to incorporation" (one track for the federal version of a right and one for the state version):

> [The *Apodaca*] ruling was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation. In *Apodaca*, eight Justices agreed that the Sixth Amendment applies identically to both the Federal Government and the States.
>
> Nonetheless, among those eight, four Justices took the view that the Sixth Amendment does not require unanimous jury verdicts in either federal or state criminal trials, and four other Justices took the view that the Sixth Amendment requires unanimous jury verdicts in federal and state criminal trials.
>
> Justice Powell's concurrence in the judgment broke the tie, and he concluded that the Sixth Amendment requires juror unanimity in federal, but not state, cases. *Apodaca*, therefore, does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.

*Ibid.* (citations omitted).

Moreover, the *McDonald* plurality opinion rejected the chief justification underlying Justice Powell's "watered-down" incorporation model—the supposed need to protect state "freedom to experiment." Justice Powell reasoned that,

> [I]n holding that the Fourteenth Amendment has incorporated "jot-for-jot and case-for-case" every element of the Sixth Amendment, the Court derogates principles of federalism that are basic to our system. In the name of uniform application of high standards of due process, the Court has embarked upon a course of constitutional interpretation that deprives the States of freedom to experiment with adjudicatory processes different from the federal model. * * *
>
> While the Civil War Amendments altered substantially the balance of federalism, it strains credulity to believe that they were intended to deprive the States of all freedom to experiment with variations in jury-trial procedure. In an age in which empirical study is increasingly relied upon as a foundation for decisionmaking, one of the more obvious merits of our federal system is the opportunity it affords each State, if its people so choose, to become a "laboratory" and to experiment with a range of trial and procedural alternatives.

*Apodaca*, 406 U.S. at 375–76 (Powell, J., concurring in the judgment). But the *McDonald* plurality disagreed; it concluded that the desire for experimentation cannot justify "watered-down" incorporation, and stressed that experimentation may happen only within constitutional limits:

> We likewise reject municipal respondents' argument that we should depart from our established incorporation methodology on the ground that making the Second Amendment binding on the States and their subdivisions

> is inconsistent with principles of federalism and will stifle experimentation. * * *
>
> There is nothing new in the argument that, in order to respect federalism and allow useful state experimentation, a federal constitutional right should not be fully binding on the States. * * * Throughout the era of "selective incorporation," Justice Harlan in particular, invoking the values of federalism and state experimentation, fought a determined rearguard action to preserve the two-track approach.
>
> Time and again, however, those pleas failed. Unless we turn back the clock or adopt a special incorporation test applicable only to the Second Amendment, municipal respondents' argument must be rejected. Under our precedents, if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise,[30] that guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems * * *.
>
> * * * * *
>
> Incorporation always restricts experimentation and local variations, but that has not stopped the Court from incorporating virtually every other provision of the Bill of Rights. "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table."

130 S. Ct. at 3045–46, 3050 (plurality opinion) (citations and footnotes omitted).

Furthermore, footnote 30, which accompanies the *stare decisis* reference, cites *only* the cases rejecting incorporation of the Grand Jury Clause and the Seventh Amendment. *Id.* at 3046 n.30. It conspicuously fails to cite *Apodaca*, thus reinforcing the doubt the opinion had earlier cast on that case, *id.* at 3035 n.14.

*Apodaca*'s "watered-down" incorporation of the Jury Trial Clause is thus a constitutional anomaly, based on logic that this Court has repudiated in *McDonald*, and that was inconsistent with prior precedent even at the time of *Apodaca* itself. This anomaly is inconsistent with this Court's many holdings that the Jury Trial Clause requires unanimity in federal cases, *e.g.*, *Andres*, *supra*. It is inconsistent with this Court's recent suggestions that unanimity is indeed required by the Jury Trial Clause in state cases. See *Blakely v. Washington*, 542 U.S. 296, 301–02 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000), discussed *infra* p. 23. It violates the properly understood Jury Trial Clause rights of Oregon and Louisiana criminal defendants. And it undermines the security of other incorporated constitutional rights, by maintaining a precedent that supports watering down those rights as well.

## II. The Oregon Nonunanimous Jury Rule Is Inconsistent with the Understanding of the Jury Trial Right as of the Ratification of the Sixth Amendment, as of the Ratification of the Fourteenth Amendment, and Since Then.

The *Apodaca* rule is incompatible with this Court's recent approach of ensuring that Americans retain at least those constitutional rights that were

recognized at the time of the Framing, and that have been traditionally recognized since then. See, *e.g.*, *McDonald*, 130 S. Ct. at 3031–34 (plurality opinion); *Blakely*, 542 U.S. at 312–13; *Crawford* v. *Washington*, 541 U.S. 36, 50–59 (2004). The unanimity requirement was seen as a fundamental part of the right to trial by jury at the time of the Framing, throughout the antebellum era, and when the Fourteenth Amendment was enacted. And it has been seen this way since, both by various Supreme Court decisions, and in the judgment of the states, 48 of which require unanimity for a criminal jury verdict.

The right is therefore "fundamental to *our* scheme of ordered liberty" and "'deeply rooted in this Nation's history and tradition,'" *McDonald*, 130 S. Ct. at 3036 (plurality opinion), is a privilege or immunity of American citizenship, *id.* at 3088 (Thomas, J., concurring in the judgment), and thus applies to the states through the Fourteenth Amendment.

### A. The Common Law and Early Constitutional Commentary Uniformly Understood "Trial by Jury" To Require a Unanimous Verdict in Criminal Cases.

The right to a unanimous jury verdict was firmly established when the Bill of Rights was framed. Sir William Blackstone noted it as an essential feature of the right to trial by jury:

> [T]he trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law. * * * [I]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his

> neighbours and equals. A constitution, that I may venture to affirm has, under providence, secured the just liberties of this nation for a long succession of ages.

2 BLACKSTONE, COMMENTARIES *378–79. Likewise, Blackstone listed the requirement of "unanimous suffrage" on a jury as part of the protection provided by the jury trial to "the liberties of England," and argued that "inroads upon this sacred bulwark of the nation [the jury trial] are fundamentally opposite to the spirit of our constitution." 4 *id.* *349–50. John Adams took the same view in America, writing that "it is the unanimity of the jury that preserves the rights of mankind." 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES 376 (Philadelphia, William Cobbett 1797).

While the Bill of Rights was being ratified, Justice James Wilson—"who was instrumental in framing the Constitution and who served as one of the original Members of this Court," *Victor* v. *Nebraska*, 511 U.S. 1, 10 (1994)—stressed the unanimity requirement in his 1790–91 lectures: "To the conviction of a crime, the undoubting and the unanimous sentiment of the twelve jurors is of indispensable necessity." 2 JAMES WILSON, WORKS OF THE HONOURABLE JAMES WILSON 350 (Philadelphia, Lorenzo Press 1804); see also 2 *id.* at 306, 311, 342, 351, 360 (further noting the unanimity requirement).

Justice Wilson's lectures were about law generally, not constitutional law as such. But he was discussing the meaning of "the trial by jury" in criminal cases. *E.g.*, 2 *id.* at 344, 348. And it is the "right to a * * * trial, by an impartial jury" that the Sixth Amendment enshrines as a constitutional command (and that Article III, § 2, cl. 3, "The Trial of all

Crimes, except in Cases of Impeachment, shall be by Jury," likewise enshrines). As George Hay, the United States Attorney in the Aaron Burr trial, put it, "The trial by jury is a technical phrase of the common law. By its insertion in the constitution, that part of the common law which prescribes the number, the unanimity of the jury and the right of challenge is adopted." *United States* v. *Burr*, 25 F. Cas. 55, 141 (C.C.D. Va. 1807).

St. George Tucker, author of the 1803 edition of *Blackstone's Commentaries*, likewise treated the Sixth Amendment as embodying the trial by jury described by Blackstone: His footnote on the Blackstone pages cited above (4 BLACKSTONE *349–50, in 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 348–51 (Philadelphia, William Y. Birch & Abraham Small 1803)) noted that "the trial by jury" described in Blackstone's text was adopted in America, and secured by the Sixth Amendment. 5 TUCKER, *supra*, at 348–49 n.2. Tucker cited the Sixth Amendment alongside its Virginia analog, which required "a speedy trial by an impartial jury of his vicinage without whose unanimous consent [the defendant] cannot be found guilty." *Ibid.* And he wrote that "without [the jurors'] unanimous verdict, or consent, no person can be condemned of any crime." 1 *id.* at App. 34.

Justice Joseph Story, in his great constitutional law treatise, likewise stressed that the constitutional "trial by jury" is the same "great privilege" that had been "part of that admirable common law." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1773, at 652 (Boston, Hilliard, Gray 1833). Justice Story endorsed the Blackstone articulation of the terms of that "great privilege": "I com-

mend to the diligent perusal of every scholar, and every legislator, the noble eulogium of Mr. Justice Blackstone on the trial by jury." 3 *id.* at 654 n.1 (citing "3 Black. Comm. 379, 380, 381; 4 Black. Comm. 349, 350," which note the requirement of unanimity); see also 3 *id.* at 652 n.1 (citing "4 Black. Comm. 349"); 3 *id.* at 653 n.2 (citing "4 Black. Comm[.] 349, 350"). And in a different passage, Justice Story further confirmed that unanimity was understood as a constitutional requirement: His discussion of the constitutional standard for impeachment contrasted the two-thirds requirement for conviction in an impeachment trial with the rule in criminal trials, where "unanimity in the verdict of the jury is indispensable." 2 *id.* § 777, at 248.

Nathan Dane's influential 1823 *General Abridgment and Digest of American Law* similarly treated the Bill of Rights as providing that "the jury in *criminal* matters must be unanimous." 6 NATHAN DANE, GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW 226 (Boston, Cummings, Hilliard & Co. 1823). Another volume of the same work echoes this: "The value and excellency of [the criminal trial by jury] is fully declared in all our constitutions, and repeatedly in our laws. In virtue of it * * * the truth of every accusation must be established by the unanimous verdict of twelve [jurors] indifferently chosen." 7 *id.* 335. A Westlaw query for *"dane abr!" "dane's abr!" & date(< 1/1/1900)* reveals that in the 1800s the *Abridgment* was cited by this Court 38 times, and over 950 times by all the cases in the ALLCASES-OLD database.

Unanimity was also part of James Madison's understanding of the right to trial by jury. Madison's original draft of what would become the Sixth

Amendment provided for trial "by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites," 1 Annals of Cong. 452 (1789).

The proposal was ultimately revised, with the "unanimity" language omitted, and there can be two alternative inferences from this change. One is "that Congress eliminated references to unanimity and to the other 'accustomed requisites' of the jury because those requisites were thought already to be implicit in the very concept of jury." *Apodaca*, 406 U.S. at 409–10 (plurality opinion). The other, which the *Apodaca* plurality endorsed, "is that the deletion was intended to have some substantive effect." *Id.* at 410.

But the plurality was mistaken; the historical evidence cited above shows that the unanimity requirement was indeed seen as "implicit in the very concept" of the Anglo-American criminal jury. Protecting the "trial by jury" safeguarded the essential incidents of the trial, such as the unanimity requirement, with no need for a detailed enumeration.

To be sure, the Jury Trial Clause did not constitutionalize all details of the common-law jury. As one early decision explained, "None would contend, at this day, in a trial of a writ of right, for the extraordinary [common-law] jury, called the grand assize, composed of four knights, 'girt with swords,' and who chose twelve other persons to be joined with them." *Dowling* v. *State*, 13 Miss. 664, 681–82 (1846) (holding that departures from common-law jury selection procedures may be constitutionally permissible under the Mississippi Constitution's jury trial provision). One could argue that even the choice of twelve as the number of jurors might be sufficiently arbi-

trary and accidental that some variation would be permitted, see *Williams* v. *Florida*, 399 U.S.86, 90 (1970), though petitioner takes no position on that question.

But, as *Dowling* put it, though "[t]he old common law has been insensibly changed and tempered to our situation and institutions," "the constitution must be construed to have adopted the generous privilege of the common law trial by jury in its essential elements." 13 Miss. at 682. Only those features that were "an accidental and not an absolute part of that institution, the mere superfluous forms and complicated proceedings of the English courts" are outside the constitutional guarantee. *Ibid.*

The unanimity requirement was indeed not just an "accidental," "superfluous" detail, but an "essential element[]" of the jury trial. It was a part of "our [English] constitution" that protected "the liberties of England" (Blackstone), and that was then accepted in America (as Story stressed). It "preserve[d] the rights of mankind" (Adams). It was "of indispensable necessity" (Wilson), "indispensable" to a criminal jury verdict (Story), part of the American design of "the several powers of government" (Tucker), and part of the trial by jury secured by "all our constitutions" (Dane).

And this view shared by these authorities is no accident, because there is nothing peripheral or arbitrary about the difference between a unanimous finding of guilt beyond a reasonable doubt and a finding of guilt entered over some jurors' dissent. As Justice Wilson put it, "To the conviction of a crime, the *undoubting and the unanimous* sentiment of the twelve jurors is of indispensable necessity," 2 WILSON, *supra*, at 350 (emphasis added). A nonunanimous jury

conviction by definition means that some juror—in petitioners' case, two jurors—found that there was a reasonable doubt about the verdict.

Likewise, Justice Wilson wrote that "it would be difficult to suggest, for [the defendant's] security, any provision more efficacious than one, that nothing shall be suffered to operate against him without the unanimous consent of the delegated body." 2 *id.* at 316. The unanimity requirement is distinctive in this respect, because it is the best protection of its kind for the defendant. The twelve-member jury size, for instance, cannot be defended this way; one can always suggest a slightly larger jury as a theoretical protection for the defendant, yet the jury size has to be limited, so some arbitrary line must be drawn. But unanimity is both a feasible protection for defendants, and the most "efficacious" one for their "security."[3]

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[3] The nonunanimous jury requirement is on balance less "efficacious" for the "security" of defendants, even though it allows 11-1 or 10-2 acquittals as well as 11-1 or 10-2 convictions. First, such splits in favor of acquittal are much rarer than such splits in favor of conviction. See, *e.g.*, CALIF. ADMIN. OFFICE OF THE COURTS, FINAL REPORT OF THE BLUE RIBBON COMMISSION ON JURY SYSTEM IMPROVEMENT 72 (1996), http://www.courtinfo.ca.gov/reference/documents/BlueRibbonFullReport.pdf (reporting, based on Los Angeles County data, that 31% of all hung juries were 11-1 or 10-2 for conviction, and only 11% were 11-1 or 10-2 for acquittal). Second, even under a unanimity rule, prosecutors would be much less likely to retry a case after a 11-1 or 10-2 jury split for conviction than after a similar split for acquittal. Making such a split in favor of acquitting into a legal acquittal would thus help defendants little—but making a similar split in favor of conviction into a legal conviction would disadvantage defendants more.

Similarly, Justice Wilson noted that jurors, who represent the same society whose officials are prosecuting the defendant, may tend to sympathize with the prosecution. In a criminal prosecution, "on one side [is] an individual—on the other, all the members of the society except himself—on one side, those who are to try—on the other, he who is to be tried." 2 *id.* at 315. This means that "the representatives [*i.e.*, the jurors] are not indifferent, and, consequently, may not be impartial." *Ibid.*

Because of this, Justice Wilson explained, "the evidence, upon which a citizen is condemned, should be such as would govern the judgment of the whole society," *ibid.*, which is to say evidence that all reasonable members of society should accept as dispositive. To provide some assurance of this, "we may require the unanimous suffrage of the deputed body [*i.e.*, the jury] who try, as the necessary and proper evidence of that judgment." *Ibid.*

This reasoning cannot be applied directly to jury size, where ten or fourteen might work as a proxy for society's views about as well as twelve would. It cannot be applied to some other historical features of the jury. But the reasoning fully supports Justice Wilson's conclusion that there is no substitute for unanimity in determining whether the evidence is "such as would govern the judgment" of all reasonable members of society. Whenever a presumptively reasonable juror finds a reasonable doubt, there is a basis to think that "the judgment of the whole society" may not support conviction—many other reasonable members of society might share the minority juror's doubts.

Justice Wilson's arguments supporting the unanimity requirement are powerful. And the value of

the unanimity requirement in ensuring the protection of minority groups, promoting deliberation among jurors, and making convictions more credible to the public further supports Justice Wilson's thinking. "Studies suggest that where unanimity is required, jurors evaluate evidence more thoroughly, spend more time deliberating and take more ballots. In contrast, where unanimity is not required juries tend to end deliberations once the minimum number for a quorum is reached." AMERICAN BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS, WITH COMMENTARY principle 4.B, at 24 (2005), http://www.abanet.org/jury/pdf/final%20commentary_july_1205.pdf.[4]

But whether the unanimity requirement is wise—or for that matter whether the jury trial requirement is wise—is not the main question here. The important point is that the unanimity requirement was understood to be a central, "indispensable" requirement of the right to trial by jury that the Framers knew and constitutionalized. Whatever flexibility the government may have in dispensing with historical features of the jury that are peripheral, ac-

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[4] See, *e.g.*, Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 669 (2001) (discussing data that tends to show that the absence of a unanimity requirement leads to less deliberation); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1262, 1273 (2000) (same); *id.* at 1264, 1298–99 (noting that the absence of a unanimity requirement may lead to less consideration of the opinions of minority groups); Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 337–38 & tbl.1 (1988) (noting that the public views unanimous juries as more accurate and fair).

cidental, or unimportant, such flexibility cannot extend to the essential requirement of unanimity.

### B. The "Trial by Jury" Was Understood as Requiring a Unanimous Verdict at the Time the Fourteenth Amendment Was Ratified.

The Fourteenth Amendment was said to secure (among other rights) the right to "trial by jury." Cong. Globe, 42d Cong., 1st Sess. app. 85 (1871) (statement of Rep. Bingham); Cong. Globe, 39th Cong., 1st Sess. 2765 (1866) (statement of Sen. Howard) ("right to be tried by an impartial jury of the vicinage"); Cong. Globe, 42d Cong., 2d Sess. 844 (1872) (statement of Sen. Sherman) ("right to be tried by an impartial jury"). And at the time the Fourteenth Amendment was ratified, "trial by jury" in criminal cases continued to be understood as requiring unanimity for conviction.

Michigan Supreme Court Justice Thomas Cooley, the "most famous" of the "late-19th-century legal scholar[s]" made this clear in his "massively popular" treatise. *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2811 (2008) (so labeling Justice Cooley and his treatise). "The jury must unanimously concur in the verdict." THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 320 (Boston, Little, Brown & Co. 1868). And Justice Cooley joined *Hill* v. *People*, 16 Mich. 351, 358 (1868), which interpreted the Michigan Constitution's jury trial clause as implicitly guaranteeing a jury in which "unanimous agreement" is required for conviction.

Other leading commentators of that period took the same view: "[I]n a case in which the constitution guarantees a jury trial," a statute allowing "a verdict upon anything short of the unanimous consent of the twelve jurors" is "void." 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF CRIMINAL PROCEDURE 532 (Boston, Little, Brown 1866). "That term ['jury'], when spoken of in connection with trial by jury in [the New York Constitution], imports a jury of twelve men whose verdict is to be unanimous. Such must be its acceptation to every one acquainted with the history of common law * * *." THEODORE SEDGWICK, TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW 530 (New York, John S. Voorhies 1857).

"[T]he jury [must] be unanimous in rendering their verdict. * * * The principle once adopted has continued as an essential part of the jury trial * * *." JOHN NORTON POMEROY, AN INTRODUCTION TO MUNICIPAL LAW 78 (New York, D. Appleton & Co. 1864) (so stating even though the author disapproved of the unanimity requirement on policy grounds). "[A] trial by jury is understood to mean—generally—a trial by a jury of twelve men, impartially selected, and who must unanimously concur in the guilt of the accused before a legal conviction can be had." JOEL TIFFANY, A TREATISE ON GOVERNMENT, AND CONSTITUTIONAL LAW 366–67 (Albany, W.C. Little 1867). "[I]t is required that the jury shall be unanimous." JOHN PROFFATT, TREATISE ON TRIAL BY JURY 119 (San Francisco, S. Whitney 1877).[5]

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[5] See *Heller*, 128 S. Ct. at 2789 (citing the Tiffany and Sedgwick treatises as authoritative); *Blakely*, 542 U.S. at 301–02 (like-

These sources show that, when the Fourteenth Amendment was adopted, the right not to be convicted without a unanimous jury verdict was counted "among those fundamental rights necessary to our system of ordered liberty," *McDonald*, 130 S. Ct. at 3042 (plurality opinion), and as among the privileges or immunities of American citizenship, *id.* at 3088 (Thomas, J., concurring in the judgment).

### C. The "Trial by Jury" Has Been Seen as Requiring Unanimity Since the Enactment of the Fourteenth Amendment.

More recent sources have continued to see unanimity as an essential part of the Sixth Amendment right to trial by jury. This Court has squarely held this many times as to federal trials. See cases cited *supra* p. 5, Part I. Even Justice Powell conceded this in *Apodaca*. 406 U.S. at 370.

The centrality of unanimous jury trials to the American right to trial by jury is also reflected in this Court's repeated references to such a requirement even as to state prosecutions. Thus, in *Blakely*, this Court reasoned that the beyond-a-reasonable-doubt standard in criminal cases rested on the "longstanding tenet[] of common-law criminal jurisprudence" that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours.'" 542 U.S. at 301 (citing 4 BLACKSTONE, COMMENTARIES *349–50). "The Framers would not have thought it too much to demand that,

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wise as to the Bishop treatise); *Lewis* v. *United States*, 518 U.S. 322, 334 (1996) (likewise as to the Proffatt treatise); *Watt* v. *Alaska*, 451 U.S. 259, 284 (1981) (likewise as to the Sedgwick treatise).

before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours,' * * * rather than a lone employee of the State." *Id.* at 313–14 (again citing Blackstone).

Likewise, in *Apprendi* v. *New Jersey*, this Court described the unanimity requirement as an essential part of the right to trial by jury, and an essential protector of the beyond-a-reasonable-doubt test:

> "[T]o guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties," 2 J. Story, Commentaries on the Constitution of the United States 540-541 (4th ed. 1873), trial by jury has been understood to require that "*the truth of every accusation,* whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours. . . ." 4 W. Blackstone, Commentaries on the Laws of England [*349–50] (1769).

530 U.S. 466, 477 (2000).

These statements were not intended to reconsider *Apodaca*; the issue was not before this Court in those cases. But they do help show that the requirement of jury unanimity is a fundamental and continuing part of our constitutional traditions, traditions that still prevail throughout 48 of the 50 states. As this Court said in *Burch* v. *Louisiana*, 441 U.S. 130 (1979), in holding that six-member criminal juries must act unanimously, the "near-uniform judgment

of the Nation"—there, too, with only two dissenting states—"provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Id.* at 138.

## III. This Court's Review Is Warranted Because the Oregon and Louisiana Supreme Courts Cannot Revisit the Issue Until This Court Acts.

Though *Apodaca* is inconsistent with this Court's more recent cases, only this Court can correct the inconsistency. The Oregon and Louisiana Supreme Courts are unlikely to themselves depart from *Apodaca*. As the Louisiana Supreme Court recently held, "we are not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination [in the plurality opinion of *Apodaca* v. *Oregon*, 406 U.S. 404 (1972),] that non-unanimous 12 person jury verdicts are constitutional may someday be overturned." *State* v. *Bertrand*, 6 So. 3d 738, 743 (La. 2009).

This Court has made clear that, "[i]t is this Court's prerogative alone to overrule one of its precedents." *State Oil Co.* v. *Khan*, 522 U.S. 3, 20 (1997). "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); see also *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997) (same). State supreme courts routinely cite *Rodriguez de Quijas*, *Agostini*, and *State Oil* for the

proposition that they *must* adhere to this Court's existing precedents, even when those precedents appear to be inconsistent with the reasoning of later decisions.

Thus, for instance, *Commonwealth* v. *Loadholt*, 923 N.E.2d 1037, 1053 n.10 (Mass. 2010), cited *State Oil* and *Rodriguez de Quijas* in declining to reconsider then-existing precedents holding the Second Amendment inapplicable to the states. It took this Court's decision a few months later in *McDonald* to overrule those precedents.

Likewise, *Johnson* v. *Commonwealth*, 591 S.E.2d 47, 60 (Va. 2004), cited *Rodriguez de Quijas* in "directly reject[ing] Johnson's argument that we should anticipate that the United States Supreme Court may reexamine and reverse its holding in *Stanford* [v. *Kentucky*, 492 U.S. 361 (1989) (holding murderers may be executed even if they committed the murder while under 18),] under an analysis similar to the one that the Court applied in *Atkins* [v. *Virginia*, 536 U.S. 304 (2002)]." It took this Court's decision in *Roper* v. *Simmons*, 543 U.S. 551 (2005), to overrule *Stanford*. See *Johnson* v. *Virginia*, 544 U.S. 901 (2005) (remanding *Johnson* v. *Commonwealth* for consideration in light of *Roper*).

Similarly, *State* v. *Ring*, 25 P.3d 1139 (Ariz. 2001), refused to strike down the Arizona death penalty scheme, under which a judge decided whether the defendant should be sentenced to death. That scheme had earlier been upheld by *Walton* v. *Arizona*, 497 U.S. 639, 648 (1990), but the reasoning of this Court's later decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), suggested that *Walton* was no longer sound. The Arizona Supreme Court in *Ring* reasoned, "[a]lthough Defendant argues that *Walton*

cannot stand after *Apprendi*, we are bound by the Supremacy Clause in such matters. Thus, we must conclude that *Walton* is still the controlling authority and that the Arizona death-penalty scheme has not been held unconstitutional under either *Apprendi* or *Jones*." 25 P.3d at 1151–52. It took this Court's decision in *Ring* v. *Arizona*, 536 U.S. 584 (2002), rev'g *State* v. *Ring*, to overrule *Walton*.

Many other state court cases likewise rely on *Rodriguez de Quijas*, *Agostini*, or *State Oil* in rejecting a criminal defendant's arguments that a precedent of this Court has been undermined by later precedents.[6] These state supreme court decisions may well be correct, given the reasoning of *Rodriguez de Quijas*. But these decisions show that it is for this Court, and not for the Oregon or Louisiana state courts, to decide whether *Apodaca* survives *McDonald* and other recent cases.

## IV. *Stare Decisis* Concerns Do Not Justify Preserving the *Apodaca* Anomaly.

The erroneous approach of *Apodaca* ought not be preserved in the name of *stare decisis*.

### A. Justice Powell's Solo Concurrence in *Apodaca* Is Not Entitled to *Stare Decisis* Effect.

As explained above, the *Apodaca* concurrence's conclusion—that the Fourteenth Amendment only

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[6] See, *e.g.*, *People* v. *Letner*, 235 P.3d 62, 112 Cal. Rptr. 3d 746, 834 (Cal. 2010); *People* v. *Huber*, 139 P.3d 628, 631 (Colo. 2007); *State* v. *Mizenko*, 127 P.3d 458, 468 (Mont. 2006); *State* v. *Gales*, 658 N.W.2d 604, 627 (Neb. 2003); *State* v. *Rodriguez*, 116 P.3d 92, 97–98 (N.M. 2005); *State* v. *Bacon*, 702 A.2d 116, 122 n.7 (Vt. 1997).

incorporates a "watered-down" version of the Jury Trial Cause—was inconsistent with this Court's past cases incorporating Bill of Rights guarantees. "Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 231 (1995); see also, *e.g.*, *United States* v. *Dixon*, 509 U.S. 688, 704 (1993) (overruling an earlier decision on the grounds that it "lack[ed] constitutional roots" and was "wholly inconsistent with earlier Supreme Court precedent").

And the concurrence's conclusion has been "undermined by later decisions." See *Arizona* v. *Gant*, 129 S. Ct. 1710, 1728 (2009) (Alito, J., dissenting) (noting this as a factor relevant to the *stare decisis* analysis); *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173–74 (1989) (likewise). *McDonald* rejected the "watered-down incorporation" model that the *Apodaca* concurrence adopted. 130 S. Ct. at 3035. And *McDonald* likewise undermined the concurrence's chief justification for this model, which was the perceived need to protect state "experimentation" in this area. See *supra* Part I.

The *McDonald* plurality opinion itself suggested—in the course of rejecting the "experimentation" argument—that *stare decisis* would not save the *Apodaca* "watered-down" incorporation doctrine. The opinion stated that Bill of Rights provisions are fully incorporated "unless *stare decisis* counsels otherwise." 130 S. Ct. at 3046 (plurality opinion). But in the accompanying footnote, *id.* at 3046 n.30, it cited only the cases rejecting incorporation of the Grand Jury Clause and the Seventh Amendment, conspi-

cuously omitting *Apodaca* from the list of cases that might be preserved by *stare decisis*.

Moreover, Justice Powell's reasoning is inconsistent with the understanding of the right to jury trial in 1791 and 1868, and with the traditional understanding of the right throughout American history. See *supra* Parts II.A–.B. The opinion has thus been undermined by later precedents that stress the importance of original meaning and history to constitutional interpretation. See, *e.g.*, *McDonald*, 130 S. Ct. at 3031–34 (plurality opinion); *Blakely*, 542 U.S. at 312–13; *Crawford*, 541 U.S. at 50–59.

Justice Powell's experimentation rationale has also been "undermined by experience since its announcement." *Citizens United* v. *FEC*, 130 S. Ct. 876, 912 (2010) (noting this as a factor against the application of *stare decisis*). Since *Apodaca*, not one state has joined Oregon and Louisiana in their experiment. Oklahoma, which had allowed nonunanimous juries for all misdemeanors, shifted to allowing them only in those "petty offense" cases where the Jury Trial Clause does not apply at all, see *supra* note 1. 1989 Okla. Sess. Law Serv. Sen. Jt. Res. 17 (West), enacted as OKLA. CONST. art. II, § 19. Occasional calls to allow nonunanimous criminal jury verdicts in other states have been rejected. See, *e.g.*, *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65 (Fla. 1972) (preserving the unanimity requirement, despite the state Chief Justice's contrary suggestion, 272 So. 2d at 66–69 (Roberts, C.J., concurring in part and dissenting in part), and despite the then-recent *Apodaca* decision).

Even the American Bar Association's brief endorsement of nonunanimous verdicts, on which Justice Powell's concurring opinion relied, 406 U.S. at

377, has been rejected by the ABA itself. In 1975 and 2005, the ABA reaffirmed the necessity of the unanimity requirement. AMERICAN BAR ASS'N, STANDARDS RELATING TO TRIAL COURTS, standard 2.10 & commentary, at 20, 23–24 (1975); AMERICAN BAR ASS'N, PRINCIPLES FOR JURIES AND JURY TRIALS, WITH COMMENTARY, *supra*, principle 4.B, at 23.

Nor has there been evidence that Oregon's and Louisiana's justice systems have become materially more efficient or fair than those of other states because of their acceptance of nonunanimous verdicts. After 40 years, there seems to be little remaining benefit in continuing experimentation.

*Stare decisis* also has less applicability to fractured decisions—such as *Apodaca*—in which no rationale received five votes. Thus, in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), this Court overruled *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), partly because "a majority of the Court [consisting of the concurring opinion providing the fifth vote and the dissent had] expressly disagreed with the rationale of the plurality," so that the earlier decision had only "questionable precedential value." 517 U.S. at 66. Likewise, in *Apodaca*, five Justices disagreed with the plurality's rationale, and eight Justices disagreed with Justice Powell's rationale.

### B. The Suggestion by the *Apodaca* Plurality That Unanimity Is Not Required Even in Federal Criminal Trials Is Not Entitled to *Stare Decisis* Effect.

The *Apodaca* plurality's conclusion—that the Sixth Amendment does not mandate jury unanimity even in federal criminal trials—was inconsistent with a solid line of this Court's decisions and with

the Amendment's original meaning. To the extent that the plurality argued the contrary, its analysis was not "well reasoned." See *Montejo* v. *Louisiana*, 129 S. Ct. 2079, 2089 (2009) (noting this as a factor in deciding whether to apply *stare decisis*).

Moreover, the *Apodaca* plurality opinion rested its conclusion partly on the judgment that "the Sixth Amendment itself has never been held to require proof beyond a reasonable doubt in criminal cases." 406 U.S. at 411. But since *Apodaca*, the Sixth Amendment has indeed been held to require exactly that. "[T]he jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan* v. *Louisiana*, 508 U.S. 275, 278 (1993). "This Court has repeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham* v. *California*, 549 U.S. 270, 281 (2007). The *Apodaca* plurality's reasoning has thus been entirely undermined by later decisions.

### C. Revisiting *Apodaca* Would Not Unduly Undermine Reliance Interests.

This Court has long recognized that correcting erroneous decisions about judicial procedure is especially proper. "'Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases . . . involving procedural and evidentiary rules' that do not produce such reliance." *Pearson* v. *Callahan*, 129 S. Ct. 808,

816 (2009) (quoting *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991)).

And *Apodaca* has not led to reliance of the sort that would justify retaining *Apodaca*'s anomalous result. Only two of the 50 states have adopted nonunanimous jury verdicts. And even in those two states, the criminal justice system has not built any complex edifice on the basis of such verdicts. Mandating unanimity in jury decisionmaking would not require the revision of those states' codes of criminal procedure or evidence. Nor would reversing *Apodaca* undermine any complex constitutional structure that this Court has built on that case; recent decisions are inconsistent with *Apodaca*, not reliant on it.

Of course, mandating jury unanimity for conviction may require retrials in those cases that are on direct review, *Teague* v. *Lane*, 489 U.S. 288, 304, 310 (1989) (plurality opinion); *id.* at 317 (White, J., concurring in part and concurring in the judgment), and in which the objection to a nonunanimous jury was preserved, *United States* v. *Booker*, 543 U.S. 220, 268 (2005). But that has been true in many cases that have reversed erroneous precedents, including many leading incorporation cases, see, *e.g.*, *Mapp* v. *Ohio*, 367 U.S. 643 (1961), overruling *Wolf* v. *Colorado*, 338 U.S. 25 (1949); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), overruling *Betts* v. *Brady*, 316 U.S. 455 (1942); *Batson* v. *Kentucky*, 476 U.S. 79 (1986), overruling in part *Swain* v. *Alabama*, 380 U.S. 202 (1965). Those cases also applied to other cases that were on direct appeal. *Linkletter* v. *Walker*, 381 U.S. 618 (1965) (so holding as to *Mapp*), disapproved of as to other matters by *Griffith v. Kentucky*, 479 U.S. 314, 321–22 (1987); *Griffith*, 479 U.S. at 328 (so holding as to *Batson*); *Pickelsimer* v. *Wainwright*, 375

U.S. 2 (1963) (per curiam) (applying *Gideon* even on habeas review, which would not be called for if *Apodaca* were overruled, given *Teague*). Yet this did not stop this Court from overruling the earlier decisions—even though such overruling applied to many more states than the two implicated here.

Similarly, the rejection in *Crawford*, 541 U.S. at 60–62, of the Confrontation Clause framework developed in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), required revisiting some cases in which the government had relied on *Roberts*. This Court itself remanded twelve cases for further consideration in light of *Crawford*: *Siler* v. *Ohio*, 543 U.S. 1019 (2004); *Watt* v. *Washington*, 543 U.S. 976 (2004); *Varacalli* v. *United States*, 543 U.S. 801 (2004); *LaFontaine* v. *United States*, 543 U.S. 801 (2004); *Calcano* v. *United States*, 543 U.S. 801 (2004); *Sarr* v. *Wyoming*, 543 U.S. 801 (2004); *Wedgeworth* v. *Kansas*, 543 U.S. 801 (2004); *Ko* v. *New York*, 542 U.S. 901 (2004); *Goff* v. *Ohio*, 541 U.S. 1083 (2004); *Prasertphong* v. *Arizona*, 541 U.S. 1039 (2004); *Shields* v. *California*, 541 U.S. 930 (2004); *Corona* v. *Florida*, 541 U.S. 930 (2004). Doubtless many other cases had to be reconsidered by lower courts. Yet that a government enacted rules believing that they are constitutional "is not a compelling interest for *stare decisis*. If it were, legislative acts could prevent [this Court] from overruling our own precedents, thereby interfering with [this Court's] duty 'to say what the law is.'" *Citizens United*, 130 S. Ct. at 913 (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

## CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2010

**APPENDIX A—Oregon Court of Appeals Decision**

**IN THE COURT OF APPEALS**
**OF THE STATE OF OREGON**

STATE OF OREGON,
Plaintiff-Respondent,

v.

ALONSO ALVINO HERRERA,
aka Alonso Alvino Anto Herrera,
Defendant-Appellant.

Multnomah County Circuit Court
080331346

A141205

**ORDER OF SUMMARY AFFIRMANCE**

Before Wollheim, Presiding Judge, and Brewer, Chief Judge.

Respondent has moved, pursuant to ORS 138.660, for summary affirmance on the ground that the appeal does not present a substantial question of law. The motion is granted. *State* v. *Cobb*, 224 Or App 594, 198 P3d 978 (2008), *rev den*, 346 Or 364 (2009).

Affirmed.

FEB 22 2010 /s

DATE

Robert Wollheim,
Presiding Judge

**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

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Prevailing party: Respondent
[ ] Costs allowed, payable by:

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## APPENDIX B—Oregon Supreme Court Denial of Review

**IN THE SUPREME COURT**
**OF THE STATE OF OREGON**

STATE OF OREGON,
Plaintiff-Respondent,
Respondent on Review,

v.

ALONSO ALVINO HERRERA,
aka Alonso Alvino Anto Herrera,
Defendant-Appellant,
Petitioner on Review

Court of Appeals
A141205

S058364

**ORDER DENYING REVIEW**

Upon consideration by the court.

The court has considered the petition for review and orders that it be denied.

June 11, 2010
DATE

/s
CHIEF JUSTICE

## APPENDIX C—Trial Court Denial of Motion for Unanimous Verdict Instruction

**IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH**

STATE OF OREGON,
Plaintiff-Respondent,

v.

ALONSO ALVINO HERRERA,
aka Alonso Alvino Anto Herrera,
Defendant-Appellant.

Case No. 0803-31346

Excerpt from the Transcript of Proceedings for August 25, 2008:

[22] * * * MS. HORNE [defense attorney]: I have presented to the Court a memorandum of law in support of a motion for a jury unanimity, an instruction for the same. I filed that this morning. * * *

[25] * * * [I]n that the Constitution of Oregon in allowing a nonunanimous verdict does indeed violate the federal Constitution and the defendant's right under the Sixth Amendment to a unanimous verdict, we would ask that you grant him a unanimous verdict in this case. * * *

MR. MICKLEY [prosecutor]: * * *

[26] * * * [T]he Court of Appeals, the Supreme Court of Oregon, and the Supreme Court of the Unit-

ed States have all confirmed Oregon's 10-2 voting requirement and I'd ask the Court to deny the motion for unanimous jury verdict.

THE COURT: And the state of the law in Oregon at this point makes it clear that that is the state of the law in Oregon, and so I will deny the motion and we will see what happens in the Supreme Court.

## APPENDIX D—Announcement of Nonunanimous Vote on the Verdict

**IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH**

STATE OF OREGON,
Plaintiff-Respondent,

v.

ALONSO ALVINO HERRERA,
aka Alonso Alvino Anto Herrera,
Defendant-Appellant.

Case No. 0803-31346

Excerpt from the Transcript of Proceedings for August 25, 2008:

[140] * * * THE COURT: * * * So were these, both of these decisions, were they unanimous decisions or not unanimous decisions? [141]

A JUROR: They were not.

THE COURT: Okay. Can you tell me what the count was for Count 1?

A JUROR: 10 to 2.

THE COURT: Okay. Okay. And what about Count 2?

A JUROR: 11 to 1 for not guilty. * * *

## APPENDIX E—Preservation of Objection to Nonunanimous Jury Instruction

**IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH**

STATE OF OREGON,
Plaintiff-Respondent,

v.

ALONSO ALVINO HERRERA,
aka Alonso Alvino Anto Herrera,
Defendant-Appellant.

Case No. 0803-31346

Excerpt from the Transcript of Proceedings for August 25, 2008:

[107] * * * MS. HORNE [defense attorney]: Judge, just so I make sure that I've got my — my record for appeal as clean as possible should I need it, no matter how fervently I argue about jury instructions, I always have to make an exception.

THE COURT: Absolutely. That's fine.

MS. HORNE: I would — I would except — take an exception to having given the standard jury instruction 10.13, the verdict in a felony case. You did instruct the jurors that they could be non — other than unanimous, and we take exception to that. * * *

THE COURT: Anything for the record, Mr. Mickley [prosecutor]?

MR. MICKLEY: No, Your Honor. * * *

## APPENDIX F—Preservation of Argument in Petitioner's Brief in the Oregon Court of Appeals

**IN THE COURT OF APPEALS**
**OF THE STATE OF OREGON**

STATE OF OREGON,
Plaintiff-Respondent,

v.

ALONSO ALVINO HERRERA,
aka Alonso Alvino Anto Herrera,
Defendant-Appellant.

Multnomah County Circuit Court
080331346

A141205

**APPELLANT'S BRIEF AND**
**EXCERPT OF RECORD[, pp. 14–17]**

**II. THE UNITED STATES CONSTITUTION FORBIDS CONVICTION BY LESS THAN A UNANIMOUS VOTE.**

If the United States Supreme Court were to revisit the issue of nonunanimous guilty verdicts today, it would disavow its precedent and strike down Oregon's present system. *Apodaca v. Oregon*, 406 US 404 (1972), was wrongly decided by a split Court and, under the view of the Sixth Amendment now adopted by a majority of the justices, is no longer good law.

A generation and more after *Apodaca*, Oregon and Louisiana continue to be the only two states to permit nonunanimous verdicts in criminal cases. The remaining forty-eight states, together with the federal government, require unanimous verdicts for criminal convictions.

The deciding vote in *Apodaca* was supplied by Justice Powell, whose rationale was that the Fourteenth Amendment's Due Process Clause did not incorporate the Sixth Amendment's jury unanimity requirement[11] against the states, leaving the unanimity requirement inapplicable in state court prosecutions. *Cf. Gann*, 254 Or at 577 (Goodwin, J., concurring in part and dissenting in part) ("the right to a unanimous jury verdict in a criminal trial is so fundamental to liberty under the American scheme of justice as to amount to a due-process right").

Justice Powell's rationale has been so seriously undermined by the line of cases beginning with *Apprendi*, 530 US 466, and continuing with *Blakely*, 542 US 296, and *United States v. Booker*, 543 US 220 (2005), that it is no longer controlling. For example, in his opinion for the Court in *Blakely*, Justice Scalia explained that the by-now-well-known *Apprendi* rule "reflects two longstanding tenets of common-law criminal jurisprudence," the first of which is "that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours[.]'" *Blakely*, 542 US at 301, quoting 4 William Blackstone, Commentaries on the Laws of England 343 (1769) (emphasis added); see also *Booker*, 543 US at

---

[11] That the Sixth Amendment requires jury unanimity is settled law. *Andres v. United States*, 333 US 740, 748 (1948).

239; *Apprendi*, 530 US at 477 (each quoting Blackstone identically).[12]

The *Apprendi* line of cases confirms that, as Justice Goodwin stated forty years ago,

> for more than five centuries Englishmen knew that they could not be convicted of crime except by the unanimous verdict of twelve peers. Moreover, by the time of the American Revolution, the protection of unanimity in criminal cases was one of the Englishman's most cherished rights.
>
> There is no reason to believe that the American colonists who adopted our Bill of Rights abandoned their English tradition with respect to trial by jury. Indeed, the evidence strongly suggests that the Sixth Amendment guaranteed of a jury trial in all criminal cases was intended to incorporate all the elements of a jury trial that were deemed protective of individual liberty in this country

---

[12] The right of jury trial is at least as old as Article XXXIX of Magna Carta. *See* Thomas Andrew Green, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800 165 (1985); FROM MAGNA CARTA TO THE CONSTITUTION: DOCUMENTS IN THE STRUGGLE FOR LIBERTY 1, 47 (D. Brooks ed. 1993). The right came into this country by way of Article 7 of the Declarations of the Stamp Act Congress, the Declaration and Resolves of the First Continental Congress, and the Declaration of Independence. *See* FROM MAGNA CARTA TO THE CONSTITUTION at 48, 55, 59. For federal prosecutions, the right to trial by jury was guaranteed by Article III, §2 of the United States Constitution. The right is reiterated in the Sixth Amendment, which applies to state court prosecutions. *Duncan v. Louisiana*, 391 US 145 (1968). For additional information on the jury trial clause's origin, *see id.* at 152-153.

> and in England when the Constitution was adopted.
>
> "Those elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous." [*Patton v. United States*, 281 US 276, 288 (1930).]

*Gann*, 254 Or at 578-579 (Goodwin, J., concurring in part and dissenting in part) (footnotes and citations omitted).

In holding that the Sixth Amendment right to jury trial is incorporated into the Fourteenth Amendment's Due Process Clause, and therefore applicable in state court prosecutions, this Court stated "that in the American states, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Duncan*, 391 US at 157-158. *Apprendi* and its progeny establish that the exact same things are true about the Sixth Amendment's unanimous verdict guarantee. That is, the unanimity requirement is a principle "of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 US 97, 105 (1934). It is "basic in our system of jurisprudence," *In re Oliver*, 333 US 257, 273 (1948), and "is necessary to an Anglo-American regime of ordered liberty," *Duncan*, 391 US at 149 n. 14.

It is clear that, notwithstanding *Gann* and *Apodaca*, the Fourteenth Amendment's Due Process Clause, as it incorporates the jury trial right, equally incorporates the unanimity requirement. This requirement thus applies to state prosecutions. Oregon's nonunanimous guilty verdict authority is therefore void. The Court erred when it instructed the jury that it could convict by a nonunanimous vote. The Court further erred in ordering that a judgment of conviction be entered based on the jury's nonunanimous vote of guilty on Count One. * * *

## APPENDIX G—Preservation of Argument in Petitioner's Petition for Review to the Oregon Supreme Court

**IN THE SUPREME COURT**
**OF THE STATE OF OREGON**

STATE OF OREGON,
Plaintiff-Respondent,
Respondent on Review,

v.

ALONSO ALVINO HERRERA,
aka Alonso Alvino Anto Herrera,
Defendant-Appellant,
Petitioner on Review

Court of Appeals
A141205

S058364

**PETITION FOR REVIEW OF ALONSO ALVINO HERRERA[, pp. 12-15]**

**II. THE UNITED STATES CONSTITUTION FORBIDS CONVICTION BY LESS THAN A UNANIMOUS VOTE.**

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A generation and more after *Apodaca*, Oregon and Louisiana continue to be the only two states to permit nonunanimous verdicts in criminal cases. The remaining forty-eight states, together with the federal government, require unanimous verdicts for criminal convictions.

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Justice Powell's rationale has been so seriously undermined by the line of cases beginning with *Apprendi*, 530 US 466, and continuing with *Blakely*, 542 US 296, and *United States v. Booker*, 543 US 220, 125 S Ct 738, 160 L Ed 2d 621 (2005), that it is no longer controlling. For example, in his opinion for the Court in *Blakely*, Justice Scalia explained that the by-now-well-known *Apprendi* rule "reflects two longstanding tenets of common-law criminal jurisprudence," the first of which is "that the 'truth of every accusation' against a defendant 'should after-

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[9] That the Sixth Amendment requires jury unanimity is settled law. *Andres v. United States*, 333 US 740, 748, 68 S Ct 880, 92 L Ed 1055 (1948).

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> spect to trial by jury. Indeed, the evidence strongly suggests that the Sixth Amendment guaranteed of a jury trial in all criminal cases was intended to incorporate all the elements of a jury trial that were deemed protective of individual liberty in this country and in England when the Constitution was adopted.
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> "Those elements were—(1) that the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous." [*Patton v. United States*, 281 US 276, 288, 50 S Ct 253, 74 L Ed 854 (1930).]

*Gann*, 254 Or at 578-579 (Goodwin, J., concurring in part and dissenting in part) (footnotes and citations omitted).

In holding that the Sixth Amendment right to jury trial is incorporated into the Fourteenth Amendment's Due Process Clause, and therefore applicable in state court prosecutions, the Supreme Court stated "that in the American states, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Duncan*, 391 US at 157-158. *Apprendi* and its progeny establish that the exact same things are true about the Sixth Amendment's unanimous verdict guarantee. That is, the unanimity requirement is a principle "of justice so rooted in the traditions and conscience of our people as to be ranked as funda-

mental." *Snyder v. Massachusetts*, 291 US 97, 105, 54 S Ct 330, 78 L Ed 674 (1934). It is "basic in our system of jurisprudence," *In re Oliver*, 333 US 257, 273, 68 S Ct 499, 92 L Ed 682 (1948), and "is necessary to an Anglo-American regime of ordered liberty," *Duncan*, 391 US at 149 n. 14.

It is clear that, notwithstanding *Gann* and *Apodaca*, the Fourteenth Amendment's Due Process Clause, as it incorporates the jury trial right, equally incorporates the unanimity requirement. This requirement thus applies to state prosecutions. Oregon's nonunanimous guilty verdict authority is therefore void. The Court erred when it instructed the jury that it could convict by a nonunanimous vote. The Court further erred in ordering that a judgment of conviction be entered based on the jury's nonunanimous vote of guilty on Count One. After receiving word of the jury's status in open court, the Court should have declared a mistrial. The remedy at this stage is to reverse defendant's conviction and order a new trial. * * *

SUPREME COURT U.S.
FILED
DEC - 1 2010
OFFICE OF THE CLERK

No. 10-344

# In the Supreme Court of the United States

ALONSO ALVINO HERRERA,
Petitioner,

v.

STATE OF OREGON,
Respondent.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

## BRIEF FOR RESPONDENT STATE OF OREGON IN OPPOSITION

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## QUESTION PRESENTED

Thirty-eight years ago this Court held, in an Oregon case, that non-unanimous, 11-1 and 10-2 jury verdicts in felony cases do not violate the Sixth Amendment. *Apodaca v. Oregon*, 406 U.S. 404 (1972). *See also Johnson v. Louisiana*, 406 U.S. 356 (1972). Since then, Oregon has relied on *Apodaca* to administer Oregon's seventy-six-year-old constitutional provision that permits less-than-unanimous jury verdicts in felony cases other than murder. Or. Const., Art. I, § 11.

Should this Court overrule *Apodaca* and hold that the Sixth Amendment, as incorporated through the Fourteenth Amendment, requires jury verdicts in state court felony cases to be unanimous?

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## STATEMENT OF THE CASE

### A. Statement of the Facts

Because the underlying facts involving petitioner's crime do not affect the analysis, those facts can be summarized briefly.

Petitioner borrowed a car from a friend to run an errand and failed to return it. (Transcript 37-38). Petitioner was arrested in the car over a week later, after a police officer stopped him for a traffic violation and discovered that the car was reported to be stolen. (Transcript 54-56, 62).

### B. Trial court proceedings

The state charged petitioner with one count of unauthorized use of a vehicle, Or. Rev. Stat. § 164.135, and one count of possession of a stolen vehicle, Or. Rev. Stat. § 819.300. (App. Br. 1,[1] ER-2, Indictment). Article I, section 11, of the Oregon Constitution provides in part:

> in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise[.]

Before trial, petitioner requested that the jury be instructed that: "This being a criminal case, each and every juror must agree on your verdict." (Transcript

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[1] "App. Br." refers to the appellant's brief that petitioner filed in the Oregon Court of Appeals.

23). The trial court refused to give the requested instruction. (App. 5a).

The jury convicted petitioner of the unauthorized-use-of-a-vehicle offense, but the verdict was not unanimous. (App. 6a). Only 10 of the 12 jurors voted to convict on the charge. (*Id.*). The jury acquitted petitioner of the possession-of-a-stolen-vehicle offense, but that verdict was not unanimous either. (*Id.*). Only 11 jurors voted to acquit petitioner on that charge. (*Id.*).

**C. State appellate court proceedings**

Petitioner appealed, contending that the trial court had erred in refusing to give his requested jury instruction. Petitioner relied on *Blakely v. Washington*, 542 U.S. 296 (2004), and specifically drew on the following passage from that opinion:

> This rule [that, generally, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt] reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769) * * *.

542 U.S. at 301 (emphasis added). Petitioner argued that *Apodaca* was inconsistent with that sentence

from *Blakely*. (App. 10a (quoting *Blakely*, 542 U.S. at 301 (in turn quoting 4 W. Blackstone, *Commentaries on the Laws of England* 343 (1769)))).

The Oregon Court of Appeals summarily affirmed, citing its decision in *State v. Cobb*, 224 Or. App. 594, 198 P.3d 978 (2008), *review denied*, 346 Or. 364, 213 P.3d 578 (2009). (App. 1a). In *Cobb*, the Oregon Court of Appeals rejected the claim that *Apodaca* was no longer good law. The court explained that "to the extent that defendant now invokes *Blakely v. Washington*, 542 U.S. 296 (2004), as overruling *Apodaca v. Oregon*, 406 U.S. 404 (1972), *sub silentio*, we have previously rejected that contention. *State v. Bowen*, 215 Or. App. 199, 168 P.3d 1208 (2007), *modified on recons.*, 220 Or. App. 380, 185 P.3d 1129 (2008)." *Cobb*, 224 Or. App. at 596-87, 198 P.3d at 979.

Petitioner filed a petition for review to the Oregon Supreme Court, renewing his argument that *Apodaca* was no longer good law in light of the *Blakely* decisions and, in particular, the statement from *Blakely* cited above. (App. 15a-16a). The Oregon Supreme Court denied review. (App. 3a).

## SUMMARY OF ARGUMENT

Petitioner asks this Court to revisit and overrule a decision it rendered thirty-eight years ago, even though this Court repeatedly has cited that decision without reservation (beyond noting the unusual split in the case) and even though Oregon has relied on that decision since 1972. Principles of *stare decisis* counsel that this Court not reconsider *Apodaca* unless petitioner provides a special justification for doing so

and makes a compelling showing that the Court's earlier decision is incorrect. Petitioner fails to do so.

In arguing that *Apodaca* is wrong, petitioner relies on this Court's recent quotations from Blackstone, who commented that the truth of every accusation against a criminal defendant should be confirmed by the unanimous suffrage of twelve of his equals and neighbors. Petitioner contends that *Apodaca* is inconsistent with those recent decisions quoting Blackstone. But there is no inconsistency. Those recent decisions dealt with other issues, and petitioner's reliance on those decisions is misplaced.

Neither does history support overruling the interpretation of the Sixth Amendment that this Court adopted in *Apodaca*. The Sixth Amendment does not explicitly include the right to a unanimous jury verdict, and this Court has held that other settled features of the common-law jury, including the requirement of a 12-person jury (*Williams v. Florida*, 399 U.S. 78 (1970)), are not included in the Sixth Amendment right to a jury the trial. Indeed, the Sixth Amendment was adopted after the Congress rejected an earlier version of the amendment that specifically would have required unanimous verdicts. Although the reason for that rejection is not clear, this Court has held that the more plausible explanation is that Congress intended that omission to have some substantive effect. Petitioner would give it none.

Nothing in *McDonald v. Chicago*, 130 S. Ct. 3020 (2010), provides a special justification for overruling *Apodaca*. In *McDonald*, the plurality discussed and applied the rule that incorporated Bill of Rights pro-

tections apply identically to the States and the Federal Government. That rule was well established at the time of *Apodaca*. *McDonald* did not alter the incorporation test and does not provide a compelling basis to reconsider *Apodaca*.

Finally, nothing in the empirical research on jury dynamics compels a conclusion that non-unanimous juries infringe on Sixth Amendment rights. Studies show little disparity in deliberation time between juries required to decide unanimously and those that do not deliberate under that requirement. To the extent there is any disparity in the length or robustness of deliberations, that disparity does not affect the accuracy of the ultimate verdict. At most, considered as a whole, the empirical research simply illustrates what this Court held in *Apodaca*: States may reasonably differ on the value of requiring unanimity.

In sum, petitioner offers scant basis for this Court to revisit and overturn decades-old precedent. This Court should do what it has done in other recent cases in which the petitioners have contended that the Sixth Amendment requires unanimous jury verdicts in state court criminal cases: deny the petition.[2]

## REASONS FOR DENYING THE PETITION

The Sixth Amendment provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and

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[2] *Bowen v. Oregon*, 130 S. Ct 52 (2009) (No. 08-1117); *Howard v. Oregon*, 129 S. Ct. 633 (2008) (No. 08-6449); *Lee v. Louisiana*, 129 S. Ct. 130 (2008) (No. 07-1523).

> public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law * * *.

U.S. Const. amend. VI. In *Apodaca*, this Court specifically upheld Oregon's state constitutional practice that allows juries to decide cases by 10-2 or 11-1 votes as well as unanimously. 406 U.S. 406.

### A. *Stare decisis* requires that petitioner provide a special justification for overruling *Apodaca*.

"Time and again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Hilton v. South Carolina Railways Comm'n*, 502 U.S. 197, 202 (1991) (quoting *Welch v. Dept. of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987)). *Stare decisis* "'promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *United States v. International Business Machines Corp.*, 517 U.S. 843, 856 (1996) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1996)). "Adherence to precedent promotes stability, predictability, and respect for judicial authority." *Hilton*, 502 U.S. at 202.

In light of those considerations, this Court has set the bar very high for overruling its prior decisions: Even in constitutional cases, this Court will not depart from the doctrine of *stare decisis* absent a "spe-

cial justification." *See Dickerson v. United States*, 530 U.S. 428, 443 (2000) ("even in constitutional cases, the doctrine [of *stare decisis*] carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification'"; internal quotation marks and citations omitted); *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("[a]lthough adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification").

Among the "factors in deciding whether to adhere to the principle of *stare decisis*" are "the antiquity of the precedent" and "the reliance interests at stake[.]" *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89 (2009). As noted, *Apodaca* is thirty-eight years old, and Oregon has relied on it since 1972 to instruct jurors in felony trials that they need not return unanimous verdicts.

"Where a decision has 'been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts,' these factors weigh in favor of reconsideration." *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009) (quoting *Payne*, 501 U.S. at 829-30). The decision in *Apodaca* is unambiguous and easy to apply. Moreover, beyond noting that *Apodaca* "was the result of an unusual division among the Justices," *McDonald*, 130 S. Ct. at 3035 n. 14, the Court has not questioned *Apodaca* and has cited it without reservation. *See Schad v. Arizona*, 501 U.S. 624, 634 n. 5 (1991) ("a state criminal defendant, at least in noncapital cases, has no

at to a unanimous jury verdict"); *Burch v.* , 441 U.S. 130, 136 (1979) (Court "con- in 1972 that a jury's verdict need not be una- aus to satisfy constitutional requirements"); *McKoy v. North Carolina*, 494 U.S. 433, 468 (1990) (Scalia, J., dissenting) (noting that the Court has "approved verdicts by less than a unanimous jury," citing *Apodaca*); *Brown v. Louisiana*, 447 U.S. 323, 330-31 (1980) (noting that the Court has held that "the constitutional guarantee of trial by jury" does not prescribe "the exact proportion of the jury that must concur in the verdict," citing *Apodaca*).

Because of the respect that *stare decisis* demands, because *Apodaca* has been settled law for thirty-eight years, and because this Court subsequently has cited *Apodaca's* holding without reservation (other than noting the "unusual" split in the case), this Court should consider overruling it only if petitioner can provide a "special justification" for doing so. He has not done so, and this Court should not grant certiorari.

### B. *Apodaca* is not inconsistent with *Blakely* or *Apprendi*.

In urging this Court to overrule *Apodaca*, petitioner and *amici* rely on this Court's recent decisions in *Blakely* and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which they claim are "inconsistent" or even "irreconcilable" with *Apodaca*. (*See, e.g.*, Pet. 11, 23-25; Oregon Professors, 11-12; Oregon Federal Public Defender, 10-11). Throughout this case, petitioner has focused, in particular, on the statement in *Blakely* that the Sixth Amendment requires "that the 'truth of

every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours.'" (App. 10a, App. Br. (quoting *Blakely*, 542 U.S. at 301 (in turn quoting Blackstone, *supra*, at 343))) (emphasis added by petitioner in App. Br.). Apparently, to varying degrees, petitioner and *amici* believe that, when the Court quoted Blackstone in its discussion of when the Sixth Amendment requires factual findings to be made by a jury rather than the court, this Court also intended to interpret the Sixth Amendment to require unanimous jury verdicts in state criminal cases.

But neither *Blakely* nor *Apprendi* dealt with the issue of whether the Sixth Amendment requires unanimous jury verdicts. The issue in *Blakely* and *Apprendi* was whether basing an enhanced sentence on fact-finding by the trial court violated the petitioner's Sixth Amendment right to trial by jury. 542 U.S. at 298; 530 U.S. at 468-69. Thus, when the Court in *Blakely* referred to the "long standing tenet" that the "truth of every accusation" against a defendant should be "confirmed by the unanimous suffrage of twelve of his equals and neighbours," 542 U.S. at 301 (quoting Blackstone), it did so in a strikingly different context, involving issues quite different than the one presented here. *Apodaca* simply is not "inconsistent" with *Blakely* and *Apprendi*.[3]

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[3] Petitioner also contends that this Court "has repeatedly held that the Sixth Amendment mandates jury unanimity for federal convictions." (*See* Pet. 2, referencing Pet. 5). But the three decisions that petitioner cites to support that assertion offer little support for his cause. In *Hawaii*

### C. Petitioner's historical arguments provide no persuasive reason for this Court to revisit the result in *Apodaca*.

Petitioner also argues that *Apodaca* is inconsistent with this Court's historical approach to interpreting the Sixth Amendment jury-trial right. (Pet. 11-12). The text of the Sixth Amendment does not reference a unanimity requirement. But petitioner argues that, under the common law, "[t]he right to a unanimous jury verdict was firmly established when

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*v. Mankichi*, 190 U.S. 197, 211-12 (1903), and *Swain v. Alabama*, 380 U.S. 202, 211 (1965), the references to jury unanimity were *dicta*. In *Mankichi*, the issue was whether the criminal procedures embodied by the Fifth Amendment's Grand Jury Clause and the Sixth Amendment's Jury Trial Clause applied to the Territory of Hawaii at that time, and the Court concluded that they did not. 190 U.S. at 209-18. *Swain* involved an equal-protection challenge to the composition of a jury. 380 U.S. 202. *Andres v. United States*, 333 U.S. 740 (1948), involved a prosecution for a crime committed on federal property. In that case, the Court concluded, rather summarily, that "[u]nanimity in jury verdicts is required where the Sixth and Seventh Amendments apply," citing only *American Pub. Co. v. Fisher*, 166 U.S. 464 (1897). *Andres*, 333 U.S. at 748, 748 n. 13. In *American Pub. Co.*, which dealt with the right to jury trial under the Seventh Amendment, the Court specifically noted that "the power of a state to change the rule in respect to unanimity of juries is not before us for consideration." 166 U.S. at 468 (citations omitted). When that issue came before the Court in *Apodaca*, the Court ruled that unanimity is not required under the Sixth Amendment.

the Bill of Rights was framed." (Pet. 11). This Court accepted that reading of history in *Apodaca*: it had been "settled" since "the latter half of the 14th century * * * that a verdict had to be unanimous" to convict someone of a crime, and that requirement "had become an accepted feature of the common-law jury by the 18th century." *Apodaca*, 406 U.S. at 407 n. 2, 408 (footnote omitted). But the fact that a feature of the common-law jury was settled when the Bill of Rights was adopted does not establish that the particular feature was incorporated into the Sixth Amendment.

This Court clearly has rejected petitioner's historical argument and held that not all features of the common-law jury are included in and guaranteed by the Sixth Amendment. Notably, although the 12-person jury also was an accepted feature of the common-law jury at the time of the Founding—and although Blackstone mentions that numerical common-law requirement in the same sentence from his Commentaries that petitioner relies on and that this Court quoted in *Blakely* and *Apprendi*—this Court has held that the Sixth Amendment does not require 12-person juries. *Williams*, 399 U.S. at 86.

The Court reviewed the relevant constitutional history in detail in *Williams*, 399 U.S. at 93-99, and summarized it in *Apodaca*, 406 U.S. at 409. The history underlying the Sixth Amendment "casts considerable doubt on the easy assumption * * * that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution." *Williams*, 399 U.S. at 92. Instead, although the historical record can lead to competing conclu-

sions, the stronger inference is that one of the features of the common-law jury that the Framers did not intend to include in the Sixth Amendment was the requirement of a unanimous jury verdict.

In *Apodaca*, this Court summarized the history of the Sixth Amendment. The Court concluded that "[t]he *most salient fact* in the scanty history of the Sixth Amendment" is that, although "as it was introduced * * *, the proposed Amendment provided for trial 'by an impartial jury of the freeholders of the vicinage, *with the requisite of unanimity for conviction* * * * and other accustomed requisites,'" ultimately the unanimity and "accustomed requisites" provisions were not included. 406 U. S. at 409 (emphases added; citation omitted). Indeed, the conference committee "refused to accept not only the original * * * language but also an alternate suggestion * * * that juries be defined as possessing 'the accustomed requisites.'" *Id.* (citation omitted).

This Court noted in *Apodaca* that, as it had "observed in *Williams*, one can draw conflicting inferences from this legislative history." 406 U. S. at 409.

> One possible inference is that Congress eliminated references to unanimity and to the other "accustomed requisites" of the jury because those requisites were thought already to be implicit in the very concept of jury. *A contrary explanation, which we found in Williams to be the more plausible, is that the deletion was intended to have some substantive effect.*

*Id.* at 409-10 (citing *Williams*, 399 U. S. at 96-97 (emphasis added)).

Thus, contrary to petitioner's claim that the history of the Sixth Amendment supports his argument that that provision includes a right to a unanimous jury verdict in state criminal trials, this Court has concluded that the "more plausible" explanation for the fact that the Amendment does not explicitly include such a right is that the deletion "was intended to have some substantive effect." "[C]ontemporary legislative and constitutional provisions indicate that where Congress wanted to leave no doubt that it was incorporating existing common-law features of the jury system, it knew how to use express language to that effect." *Williams*, 399 U.S. at 97. Petitioner's historical argument conflicts with *Williams* and *Apodaca*, and the conclusions that the Court drew from the historical record in those cases.

In *Apodaca*, this Court also reviewed the reasons why the unanimous jury verdict had become a settled feature of the common law. As this Court observed in *Williams*, 399 U.S. at 89—with regard to the requirement of a 12-person jury—the requirement of a unanimous jury verdict appears to have been a "historical accident" that had its origins in outmoded medieval concepts.

This Court has identified "[a]t least four [possible] explanations * * * for the development of unanimity" at common law. *Apodaca*, 406 U. S. at 407 n. 2. All of them are either outmoded or historical accidents. The first explanation is that "unanimity developed to compensate for the lack of other rules insuring that a

defendant received a fair trial." *Id.* (citations omitted). The "second theory is that unanimity arose out of the practice in the ancient mode of trial by compurgation of adding to the original number of 12 compurgators until one party had 12 compurgators supporting his position; the argument is that when this technique * * * was abandoned, the requirement that one side obtain the votes of all 12 jurors remained." *Id.* (citations omitted).

"A third possibility is that unanimity developed because early juries, unlike juries today, personally had knowledge of the facts of a case," that "the medieval mind assumed there could be only one correct view of the facts," and that if either all or a minority of the jurors "declared the facts erroneously, they might be punished for perjury." *Id.* (citations omitted). "Given a view that minority jurors were guilty of criminal perjury, the development of a practice of unanimity would not be surprising." *Id.* "The final explanation is that jury unanimity arose out of the medieval concept of consent." *Id.* To the medieval mind, the concept of consent "carried with it the idea of * * * unanimity[.]" *Id.* (internal quotation marks and citation omitted). Even in 18th century America, there was "a similar concern that decisions binding on the community be taken unanimously." *Id.* (citation omitted).

Those historical reasons for the common-law requirement of a unanimous jury verdict have little, if any, force now. Instead, "[m]any of the possible historical reasons for the unanimity requirement are ones that are substantially less persuasive now—and

the Court itself has recognized this." Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 Hastings Const. L. Q. 141, 142 (2006). "If unanimity developed at common law 'to compensate for the lack of other rules insuring that a defendant received a fair trial,' American criminal procedure now has many more substantial protections for defendants." Leib, *supra*, at 142 (quoting *Apodaca*, 406 U. S. at 407 n. 2) (footnote omitted). If unanimity "arose out of the practice in the ancient mode of trial by compurgation"—a mode of trial where certain kinds of witnesses essentially became jurors—that practice "has very little relevance to contemporary trials, where we'd never allow a witness on the jury[.]" Leib, *supra,* at 143. "[W]e should have no allegiance to a decision rule that arose out of a jury practice that has so little to do with our own." *Id.* "If the unanimity requirement arose out of the medieval idea that reasonable people cannot disagree and that minority jurors must be lying, we must certainly abandon it in our pluralistic society." *Id.* (footnote omitted). Given the outdated rationales for the common-law requirement of unanimity, reading it into the Sixth Amendment would be to "ascribe a blind formalism to the Framers[.]" *Williams*, 399 U.S. at 103.

Thus, neither the history of the Sixth Amendment nor the reasons for the common-law requirement of jury unanimity provide any "special justification," *Dickerson*, 530 U.S. at 443 (internal quotation marks omitted), to disregard principles of *stare decisis* and overrule *Apodaca*. Instead, as this Court has recognized, *Apodaca*'s treatment of history parallels the Court's treatment of history in *Williams*. *See Burch*,

441 U.S. at 136 (noting that "[a] similar analysis" to that in *Williams* led the Court in *Apodaca* to conclude "that a jury's verdict need not be unanimous to satisfy constitutional requirements, even though unanimity had been the rule at common law"); *Ludwig v. Massachusetts*, 427 U.S. 618, 625 (1976) (a "[s]imilar analysis [to that in *Williams*] led to the holding in *Apodaca* that the jury's verdict need not be unanimous"). Petitioner's argument would require reconsideration not only of *Apodaca* but also the basis for *Williams*. Petitioner is asking this Court to plow ground that it has already covered in detail. The Court should refuse to do so.

### D. *McDonald* did not alter the incorporation test and does not provide a special justification for overruling *Apodaca*.

Petitioner asserts that this Court's recent decision in *McDonald* provides a compelling basis to reconsider and overrule *Apodaca*. (Pet. 5-11). In *McDonald*, 130 S. Ct. 3020, the Court held that the Second Amendment right to keep and bear arms applies to the States under the Fourteenth Amendment. The plurality reached that result under the Due Process Clause. 130 S. Ct. at 3050. Justice Thomas provided the fifth vote in his concurrence. *Id.* at 3058-88 (Thomas J., concurring in part and concurring in judgment). Justice Thomas rejected the view that the right was incorporated under the Due Process Clause, *id.* at 3061-63; but he concluded that it was incorporated under the Fourteenth Amendment's Privileges or Immunities Clause. *Id.* at 3088.

In *McDonald*, the plurality referenced the rule that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" 130 S. Ct. at 3035 (quoting *Malloy v. Hogan*, 378 U.S. 1, 10 (1964)). Petitioner asserts this court should overrule *Apodaca* in light of that analysis because, in his concurrence in *Apodaca*, Justice Powell took a different view of incorporation. (Pet. 5-11).

*McDonald* does not provide a special justification to depart from the doctrine of *stare decisis* and overrule *Apodaca*. In *McDonald*, the Court did not alter the incorporation test but instead applied "the [incorporation] standard that is well established in [the Court's] caselaw." 130 S. Ct. at 3026. The rule that incorporated Bill of Rights provisions apply equally to the States and the Federal Government was well established at the time of *Apodaca*. *See McDonald*, 130 S. Ct. at 3035 (plurality opinion) (quoting Court's 1964 *Malloy* decision for rule and citing several other cases from same period). Nothing in the Court's application of that rule in *McDonald* was remarkable, much less provides a compelling basis to reconsider and overrule *Apodaca*.

Yet petitioner asserts that *McDonald* signaled, or at least pointedly suggested, that *Apodaca* is not entitled to deference under the doctrine of *stare decisis*. (Pet. 11, 28-29). The plurality in *McDonald* explained that, "if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare de-*

*cisis* counsels otherwise, that guarantee is fully binding on the States[.]" 130 S. Ct. at 3046 (footnote omitted). In its accompanying footnote, the opinion cited the Court's decisions that the Fifth Amendment's Grand Jury Clause and the Seventh Amendment's civil-jury requirement do not apply to the States and explained that those decisions "predate the era of selective incorporation." *Id.* at 3046 n. 30, citing *Hurtado v. California*, 110 U.S. 516 (1884) (indictment) and *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916) (civil jury). Petitioner opines that the plurality "conspicuously omitt[ed] *Apodaca* from the list of cases that might be preserved by *stare decisis*." (Pet. 28-29).

Petitioner misses the point. A change in the law is a recognized argument in favor of reconsidering an earlier decision. *See Alabama v. Smith*, 490 U.S. 794, 803 (1989) (a "later development of * * * constitutional law" is a basis for overruling a prior decision). Indeed, that was the basis for *McDonald*. In *McDonald*, the Court concluded that its prior decisions holding that the Second Amendment was not incorporated against the States did not "preclude" the Court from considering whether the Due Process Clause incorporated the right because the Court's earlier decisions "preceded" the era of selective incorporation. 130 S. Ct. at 3031. In its footnote, the plurality in *McDonald* merely was acknowledging that any similar reconsideration of the *Hurtado* and *Bombolis* holdings—which also "predate the era of selective incorporation"—would be subject to *stare decisis* considerations. In contrast, *Apodaca* was decided during the era of selective incorporation, and the incorporation test has

not changed since that decision. The *McDonald* plurality recognized as much by omitting *Apodaca* from the list of decisions theoretically subject to reconsideration based on a change in the law.[4]

**E. Recent empirical research is not relevant to whether this Court should revisit *Apodaca* and, in all events, provides no persuasive support for petitioner's claim.**

Petitioner and *amici* invoke empirical research to demonstrate the wisdom of a unanimity requirement. As discussed above, before this Court revisits *Apodaca*, petitioner must provide a "special justification" for doing so, which would require considerably more than a suggestion that jury unanimity may be "wiser" than non-unanimous juries. As this Court has recognized, "no judicial system could do society's work if it

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[4] Petitioner also is mistaken in asserting that *Sullivan v. Louisiana*, 508 U.S. 275 (1993), undermines *Apodaca*. (Pet. 31). In *Sullivan*, the Court explained that "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." 508 U.S. at 278. But in *Johnson v. Louisiana*, and *Apodaca*, the Court rejected the argument that jury unanimity is necessary to give substance to the reasonable-doubt standard. *See Johnson*, 406 U.S. at 358-63 (rejecting argument); *Johnson*, 406 U.S. at 368 (Powell J., concurring) (agreeing and joining opinion); *Apodaca*, 406 U.S. at 412 (plurality opinion) (explaining that the reasonable-doubt requirement is rooted in due process and that *Johnson* rejected argument that non-unanimous verdicts undermine reasonable-doubt standard). *Sullivan* does not provide a special justification to overrule *Apodaca*.

eyed each issue afresh in every case that raised it." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992) (citing B. Cardozo, *The Nature of the Judicial Process* 149 (1921)). Instead, when this Court re-examines a prior holding, "its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law[.]" *Id.* at 854.

Recent empirical research demonstrating that a state's decision to permit non-unanimous juries may affect the dynamics of jury deliberations provides no basis to revisit long-standing precedent. The question here—as it was in *Apodaca*—is whether the Sixth Amendment prohibits non-unanimous juries; nothing about that constitutional question has changed in the 38 years since this Court decided *Apodaca*. That petitioner and *amici* can point to some studies suggesting that states *should not* permit non-unanimous juries says nothing about whether the states *cannot* permit non-unanimous juries. States remain free to make policy choices so long as those choices do not infringe upon constitutional protections and liberties. In all events, nothing since *Apodaca*—empirically or experientially—has demonstrated that this Court's decision in *Apodaca* is unworkable or unsound, or suggests that *Apodaca* was based on a fundamentally mistaken, or subsequently discredited, view of jury dynamics.

Petitioner and *amici* rely on conclusions from various studies that jurors who are not required to achieve unanimity evaluate the evidence less thor-

oughly, spend less time deliberating, and take fewer ballots. (*See, e.g.*, Pet. 20, 20 n. 4; Oregon Professors, 6-8; Oregon Federal Public Defender, 17). They apparently believe that that evidence undermines this Court's conclusion in *Apodaca* that a unanimity requirement "does not materially contribute to the exercise" of a jury's "commonsense judgment." 406 U.S. at 410. But studies show that little disparity actually exists in the duration of deliberations and—even more critically—that to the extent that there is any disparity in the length or robustness of deliberations, that disparity does not affect the accuracy of the ultimate verdict.

The "most comprehensive jury study" conducted in the past thirty years has shown a "minimal disparity" between the amount of time that juries spend deliberating when unanimity is required and the amount of time they spend when unanimity is not required. Harry Kalven, Jr. & Hans Zeisel, *The American Jury* 488 (1966); Michael H. Glasser, *Comment: Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 Fla. St. U. L. Rev. 659, 672 (1997). That same study also demonstrates that in nine out of ten cases, the result of the first ballot is the same as the verdict. *Id.*; *see also* Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research in Deliberating Groups*, 7 Psychol. Pub. Pol'y & L. 622, 690 (2001). Thus, to the extent that there is any disparity in the length of deliberation, that time is often spent trying to convince one or two holdouts. And in jurisdictions that require jury unanimity, those holdout jurors often simply succumb to the "pressure for unanimous agreement[.]" Leib, *su-*

*pra*, at 145. Hence, contrary to petitioner's assumptions, a jury unanimity requirement does not necessarily guarantee or promote "open-minded" debate in an ideally deliberative environment; rather, the time spent attempting to achieve unanimity is often spent pressuring and cajoling the few holdouts into acquiescence.

Of greater significance, however, is that the degree and nature of the deliberations is not directly proportional to the accuracy of any verdict. Most experts agree that the accuracy of the ultimate verdict is not contingent upon whether jury unanimity is required. *See* Leib, *supra*, at 144 ("most agree that the outcomes of verdicts do not significantly vary" depending upon whether there exists a unanimity rule or not). Permitting juries to reach non-unanimous verdicts, therefore, does not undermine the ultimate purposes of the jury: to safeguard a defendant against the corrupt or overzealous prosecutor and the biased judge, and to assure a fair and equitable resolution of factual issues. *Apodaca*, 406 U.S. at 410-11; *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 498-99 (1931).

Petitioner and *amici* further contend that allowing non-unanimous jury verdicts marginalizes jurors who are members of minority groups. (Pet. 20, 20 n. 4, Oregon Federal Public Defender, 17). They rely on empirical research that, in their view, demonstrates that the non-unanimous jury scheme in effect silences dissenting and minority voices. (*Id.*). But unanimity cannot guarantee mutual tolerance. Akhil Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C.

Davis L. Rev. 1169 (1995). That is, unanimity simply does not guarantee that juries will tolerate opposing or minority views or listen to reason and consider the evidence. In reality, whether the minority is likely to speak up or not depends more upon the different personalities of the jurors. Glasser, *supra*, at 674. In fact, it is at least equally likely that the non-unanimous jury system actually encourages the minority to speak up, because they need to convince fewer other jurors to come to their side. *Id.*

In sum, to support overruling a constitutional decision that Oregon has been relying upon for 38 years, petitioner and *amici* must provide something more compelling than some recent analyses of jury behavior. That is particularly true when the proffered showing consists of an incomplete picture of how the non-unanimity requirement affects jury deliberations. Wiser or not, unanimous juries are not a Sixth Amendment mandate. This Court thus need not reconsider the system that Oregon's Constitution requires Oregon to follow and that this Court already has upheld.

## CONCLUSION

In the nearly 40 years that have passed since this Court decided *Apodaca*, nothing has changed. Petitioner asks this Court to grant his petition and reconsider *Apodaca* based on quotations from *Blakely* and *Apprendi* that are taken out of context, history that this Court already has concluded does not support petitioner's argument, incorporation analysis from *McDonald* that was well established when this Court decided *Apodaca*, and empirical research that does

not yield any clear conclusion that unanimous jury verdicts are necessarily preferable, let alone constitutionally required. As it did at least once in 2009 and twice in 2008, note 2, *supra*, this Court should decline the invitation and deny the petition.

Respectfully submitted,

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No. 10-344

# In the Supreme Court of the United States

ALONSO ALVINO HERRERA,

*Petitioner*,

v.

STATE OF OREGON,

*Respondent.*

**On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

Petitioner's position rests on three main arguments:

**1.** As this Court has repeatedly stated, the Jury Trial Clause requires unanimous convictions in federal criminal cases.

**2.** As this Court concluded in *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010), incorporated Bill of Rights provisions apply to States the same way they apply to the Federal Government.

**3.** Therefore, state criminal convictions must be unanimous as well, and *stare decisis* does not preclude this Court from so holding, despite the contrary, badly splintered decision in *Apodaca* v. *Oregon*, 406 U.S. 404 (1972).[1]

The State's responses to these arguments are unsound. First, the State argues—contrary to this Court's statements—that the Jury Trial Clause does not require unanimity at all. Second, the State fails to acknowledge that the *McDonald* plurality (explicitly) and the *McDonald* concurrence (by necessary implication) repudiated the foundation for the *Apodaca* result, and for the *Apodaca* controlling opinion. Third, the State argues that *stare decisis* mandates adherence to *Apodaca*, but does not confront this Court's conclusions that outlier decisions (such as *Apodaca*) do not merit much *stare decisis* weight.

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[1] The petition also argues that this Court's review is warranted because state courts cannot revisit this issue in light of *McDonald* until this Court acts. Pet. 25–27. The State does not disagree on this.

## I. The State Errs In Denying That The Jury Trial Clause Requires Unanimity For Conviction

The State suggests the Sixth Amendment itself does not require jury unanimity, even in federal cases. "[O]ne of the features of the common-law jury that the Framers did not intend to include in the Sixth Amendment was the requirement of a unanimous jury verdict." Br. in Opp. 12.

In this, the State rejects this Court's repeated conclusions that the Sixth Amendment does require jury unanimity. In *Andres* v. *United States*, 333 U.S. 740, 748–49 (1948), this Court concluded that "[u]nanimity in jury verdicts is required" under the Sixth Amendment. In *Patton* v. *United States*, 281 U.S. 276, 289–90 (1930), this Court stated that "the requirement of unanimity" is "embedded" in the Jury Trial Clause. In *Swain* v. *Alabama*, 380 U.S. 202, 211 (1965), overruled on other grounds by *Batson* v. *Kentucky*, 476 U.S. 79 (1986), this Court stated that "the system followed in the federal courts by virtue of the Sixth Amendment" requires that jurors "unanimously agree on a verdict."

In three cases around 1900, this Court considered whether the right to trial by jury applied against the governments of continental Territories, insular possessions, and States. In all three cases, this Court treated jury unanimity as mandated wherever the Sixth Amendment applies. See *Thompson* v. *Utah*, 170 U.S. 343, 349–51 (1898) (concluding that the Sixth Amendment, and therefore the unanimity requirement, applies to continental Territories), overruled on other grounds by *Collins* v. *Youngblood*, 497 U.S. 37, 47 (1990); *Maxwell* v. *Dow*, 176 U.S. 581, 583–84 (1900) (stating that the Sixth Amend-

ment does not apply to States, but includes a unanimity requirement when applied to the federal government); *Hawaii* v. *Mankichi*, 190 U.S. 197, 211–12 (1903) (suggesting, citing *Thompson*, that various aspects of the Sixth Amendment do not apply to insular possessions, though the Sixth Amendment does include a unanimity requirement when applied to the federal government).

In *Williams* v. *Florida*, 399 U.S. 78, 91–92 (1970), this Court abrogated *Patton*, *Thompson*, and *Maxwell* as to their conclusion that federal criminal trials must use 12–member juries, but expressly declined to consider those cases' conclusion about the unanimity requirement, *id.* at 100 n.46. And two years later, in *Apodaca*, a majority of the Justices concluded that the Sixth Amendment does require a unanimous verdict for federal convictions, expressly reaffirming *Patton*, *Thompson*, and *Maxwell* on that score. 406 U.S. at 369–70 (Powell, J., concurring in the judgment); *id.* at 380–83 (Douglas, J., joined by Brennan & Marshall, JJ., dissenting); *id.* at 414–15 (Stewart, J., joined by Brennan & Marshall, JJ., dissenting).

Finally, in *McDonald*, both the plurality and Justice Stevens specifically acknowledged that "the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials." 130 S. Ct. at 3035 & nn.13, 14; *id.* at 3094 (Stevens, J., dissenting).

The State's challenge to this well-settled rule errs in five related ways.

1. The State repeatedly and mistakenly ascribes to "this Court" the *Apodaca* plurality's view that the Sixth Amendment does not require unanimity. Br. in

Opp. 4, 11, 12, 13. In fact, a majority of this Court's members rejected that position in *Apodaca*.

2. The State does not mention any of the 1790s and 1800s commentators—including St. George Tucker, Joseph Story, and Thomas Cooley—whom the petition cited to show that the constitutional right to trial by jury was historically understood as requiring unanimity to convict. Pet. 13–15, 21.

3. The State argues, relying on the *Apodaca* plurality's minority position, that the drafting history of the Jury Trial Clause suggests the First Congress deliberately rejected a unanimity requirement. Br. in Opp. 11–12. As the petition noted (at 15–16), James Madison's original draft of the Jury Trial Clause provided for a jury trial "with the requisite of unanimity for conviction, * * * and other accustomed requisites," 1 Annals of Cong. 452 (1789), but Congress ultimately omitted the quoted clause.

There are two alternative inferences from this omission. One is that the unanimity requirement was omitted because it was "thought already to be implicit in the very concept of jury." *Apodaca*, 406 U.S. at 409–10 (plurality opinion). This would be consistent with the view of five Justices in *Apodaca*. The other position, endorsed by only the four Justices in the *Apodaca* plurality, and now urged by the State, "is that the deletion was intended to have some substantive effect." *Id.* at 410.

"It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process." *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2796 (2008). This is so precisely because the revision is often ambiguous. Even the State acknowledges that, under its understanding of

the drafting history, "the historical record can lead to competing conclusions." Br. in Opp. 11.

But when the drafting history is ambiguous, the ambiguity can only be resolved by looking at the historical record more broadly. One historical source consists of the 1800s constitutional commentators who considered that record. This is why the Justices of this Court have repeatedly turned to the commentators the petition relies on, especially Tucker, Story, and Cooley. See, *e.g.*, *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 799 (1995); *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in the judgment); *E. Enters.* v. *Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *Harmelin* v. *Michigan*, 501 U.S. 957, 982 (1991) (Scalia, J., joined by Rehnquist, C.J.); *Heller*, 128 S. Ct. at 2811; *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 225 (1995). (Tucker published his treatise only 12 years after the Bill of Rights was ratified, and Story received his legal training in the 1790s.) Those commentators' views resolve any ambiguity that there might be here: The Sixth Amendment was originally understood, and has since been understood, as requiring unanimity for criminal conviction.

Another source to consult when "[t]he Constitution's text does not alone resolve th[e] case," *Crawford* v. *Washington*, 541 U.S. 36, 42 (2004), is "the historical background of the Clause," *id.* at 43. See also *Yeager* v. *United States*, 129 S. Ct. 2360, 2365 (2009) (noting approvingly that most of this Court's decisions interpreting the Double Jeopardy Clause "have found more guidance in the common-law ancestry of the Clause than in its brief text"). This is why the petition (at 13) discussed Blackstone's expli-

cation of the meaning of the trial by jury, as well as Justice James Wilson's historical discussion of the trial by jury. Those analyses—which the State likewise does not confront—confirm that unanimity was seen in the Framing era as an essential element of the "right to a * * * trial, by an impartial jury."

4. The State argues, citing the minority view in *Apodaca*, that all the possible "explanations * * * for the development of unanimity" "are either outmoded or historical accidents." Br. in Opp. 13. Petitioner doubts such an argument could justify departing from historically understood constitutional conclusions. But in any event, the State fails to discuss the clearest and most authoritative explanations for the Framers' retention of unanimity—the explanations offered by James Wilson, one of the drafters of the Constitution and one of the founding Justices of this Court, who was writing at the very time the Bill of Rights was being ratified (1790–91).

As the petition noted (at 18–20), Justice Wilson gave two related reasons for the unanimity requirement. To begin with, the unanimity requirement assures especially strong protection against wrongful conviction. "[I]t would be difficult to suggest, for [the defendant's] security, any provision more efficacious than one, that nothing shall be suffered to operate against him without the unanimous consent of the [jury]." 2 JAMES WILSON, WORKS OF THE HONOURABLE JAMES WILSON 316 (Philadelphia, Lorenzo Press 1804) (reprinting lectures delivered in 1790–91) (available in Google Books). Together with other protections, the unanimity requirement helps "innocence * * * be secure," 2 *id.* at 317, and "effectually protect[s]" the accused "from the concealed and poi-

soned darts of private malice and malignity," 2 *id.* at 351.

Moreover, the unanimity requirement minimizes the risk that a conviction would stem from undue sympathy by the jury, which is drawn from the people, towards the prosecution, which is brought on behalf of the people. In a criminal prosecution, "on one side [is] an individual—on the other, all the members of the society except himself—on one side, those who are to try—on the other, he who is to be tried." 2 *id.* at 315. This means that the jurors "are not indifferent, and, consequently, may not be impartial." *Ibid.*

Because of this, Justice Wilson explained, "the evidence, upon which a citizen is condemned, should be such as would govern the judgment of the whole society," *ibid.*, meaning evidence that all reasonable members of society should accept as dispositive. To provide some assurance of this, "we may require the unanimous suffrage of the [jury], as the necessary and proper evidence of that judgment." *Ibid.* There is nothing "outmoded" or "medieval," Br. in Opp. 13, about these rationales, or about the unanimity requirement.

**5.** Finally, the State argues (at 11) that "not all features of the common-law jury are included in and guaranteed by the Sixth Amendment," pointing as an analogy to this Court's approval of 6–member juries. *Williams* v. *Florida*, 399 U.S. 78 (1970). The petition discusses (at 16–21) why the unanimity requirement is an essential feature of the right to trial by jury, even if the 12–member size is not. Here petitioner briefly notes some specific differences between these requirements.

First, there is reason to think the Framers would have treated the unanimity requirement as more essential to the criminal jury than the traditional size. In particular, James Wilson stressed the importance of the criminal jury unanimity requirement at length, but dismissed the importance of the particular size of the jury. 2 WILSON, *supra*, at 305–68.

Second, American law since the Framing has treated the unanimity requirement as more essential to the criminal jury than the traditional size. Only two states allow nonunanimous juries in cases to which the Jury Trial Clause applies (*i.e.*, all cases except petty offense cases, in which the maximum penalty is six months or less, Pet. 3 n.1). Yet at least twenty states allow juries with fewer than 12 members in at least some cases to which the Jury Trial Clause applies. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION 2004, at 233–36, http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1204. The presence or absence of a "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch* v. *Louisiana*, 441 U.S. 130, 138 (1979).

Third, this Court's opinions have treated the unanimity requirement as more essential to the criminal jury than the traditional size. As was mentioned above, the constitutional rule for federal trials continues to be that unanimity is required and the 12–member size is not.

Fourth, this historical difference in treatment is based on a logical and functional difference. The number twelve is one of several equally reasonable places to set the jury size. There can be no logical dif-

ference in kind between a jury of twelve and, for instance, a jury of eleven or thirteen.

But a unanimous verdict is logically quite different from an 11–1 verdict or a 10–2 verdict: The nonunanimous verdicts demonstrate that at least one presumptively reasonable juror perceived a reasonable doubt about the defendant's guilt. Conversely, a unanimous verdict has moral force that a nonunanimous one cannot have: "Can the voice of the state [in criminal prosecutions] be indicated more strongly, than by the unanimous voice of * * * [the] jury?" 2 WILSON, *supra*, at 350. The powerful empirical evidence cited by *amici* in favor of the unanimity requirement simply buttresses what Anglo-American legal traditions, from before the Framing to the present, have long recognized.

## II. The State Does Not Confront The Inconsistency Of *Apodaca* With *McDonald*

This Court in *McDonald* rejected the mode of analysis that produced the *Apodaca* result, and that undergirded the *Apodaca* controlling opinion. See Pet. 5–11. The plurality opinion repeatedly stressed that incorporated Bill of Rights clauses apply equally to the state and federal governments, and Justice Thomas's concurrence implicitly accepted the same principle in its analysis. Pet. 5–7. This is directly contrary to the *Apodaca* result, and to the reasoning of the controlling *Apodaca* opinion.

Moreover, the *McDonald* plurality noted that its approach was inconsistent with *Apodaca*:

> [The *Apodaca*] ruling was the result of an unusual division among the Justices, not an endorsement of the two-track approach to in-

> corporation. * * * *Apodaca* * * * does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.

130 S. Ct. at 3035 n.14 (citations omitted). That *Apodaca*'s "two-track" approach does not undermine *McDonald*'s "apply identically" approach means that *McDonald* does undermine the *Apodaca* approach.

The State argues that, "beyond noting that *Apodaca* 'was the result of an unusual division among the Justices,' [*McDonald*], the Court has not questioned *Apodaca*." Br. in Opp. 7. But *McDonald*'s rejection of the very reasoning on which *Apodaca*'s controlling opinion rested does cast *Apodaca*'s logic into "question[]."

The State also argues that *Apodaca* should not be revisited because "the incorporation test has not changed since that decision," Br. in Opp. 18–19. See also *id.* at 17 ("[i]n *McDonald*, the Court did not alter the incorporation test"); *id.* at 5.

But the *Apodaca* controlling opinion, and therefore the *Apodaca* result, rests on a particular conclusion about incorporation—that incorporated Bill of Rights provisions may mean something different with regard to the states than with regard to the federal government. *McDonald* rests on the opposite conclusion. *Apodaca* departed from earlier holdings. Pet. 6–7. *McDonald* returned to those holdings. *Apodaca* cannot be reconciled with *McDonald*.

## III. *Apodaca* Should Not Be Given Substantial *Stare Decisis* Weight

Petitioner does agree, however, with the State's statement that "[t]he rule that incorporated Bill of Rights provisions apply equally to the States and the Federal Government was well established at the time of *Apodaca*," Br. in Opp. 17, and that *McDonald* is consistent with that rule, *ibid.*

With that statement, the State makes petitioner's argument for him. *Apodaca* is a constitutional outlier, a brief departure from a firmly entrenched constitutional rule. This Court has repeatedly concluded that such constitutional outliers do not deserve much *stare decisis* weight.

To borrow from those conclusions, *Apodaca* was "an 'aberration' insofar as it departed from the robust protections we had granted [incorporated constitutional rights] in [this Court's] earlier cases." *Citizens United* v. *FEC*, 130 S. Ct. 876, 921 (2010) (Roberts, C.J., concurring). "Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error * * *." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 231 (1995). *Apodaca* "lacks constitutional roots. The ['watered-down incorporation'] rule it announced is wholly inconsistent with earlier Supreme Court precedent * * *." *United States* v. *Dixon*, 509 U.S. 688, 704 (1993).

*Apodaca* ought to be "overruled" because it "stands as an anomaly in the jurisprudence * * * of constitutional law," *College Savings Bank* v. *Florida*

*Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 680 (1999), and because it is "inconsistent with the basic rationale of [a longer] line of cases," *Lapides* v. *Board of Regents*, 535 U.S. 613, 623 (2002). *Apodaca* and *McDonald* "are irreconcilable"; this Court's incorporation "jurisprudence cannot be home to both," *Ring* v. *Arizona*, 536 U.S. 584, 609 (2002)—especially given the State's acknowledgment that this Court's other past precedents are on *McDonald*'s side.

The petition explains further why *Apodaca* does not merit much *stare decisis* weight. See Pet. 27–33. This subsection simply stresses the State's admission that *Apodaca*'s two-track approach to incorporation is a total constitutional outlier.

## CONCLUSION

For these reasons and those given in the petition (and supported by the briefs of *amici*), the petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

ALONSO ALVINO HERRERA

*Petitioner,*

*v.*

STATE OF OREGON

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON**

## BRIEF OF *AMICUS CURIAE* PROFESSOR JEFFREY B. ABRAMSON IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*[1]

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## REASONS FOR GRANTING THE PETITION

In federal criminal proceedings, the Sixth Amendment's Jury Clause requires a unanimous verdict to convict an accused. See, *e.g.*, *Andres* v. *United States*, 333 U.S. 740, 748 (1948); *Apodaca* v. *Oregon*, 406 U.S. at 369 (1972) (Powell, J., concurring) ("In an unbroken line of cases reaching back into the late 1800's, the Justices of this Court have recognized, virtually without dissent, that unanimity is one of the indispensible features of federal jury trial." (emphasis omitted)).

The Jury Clause indisputably is incorporated against the States through the Fourteenth Amendment's Due

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[1] The parties have provided written consent to the filing of this brief. Those consents are lodged with this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or his counsel made a monetary contribution to the brief's preparation or submission.

Process Clause. See, *e.g.*, *Duncan* v. *Louisiana*, 391 U.S. 145, 149-50 (1968). The sole question here is whether the Jury Clause is only *partially* incorporated, such that the State of Oregon is free to use a "10-2 rule" that was designed "to make it easier to obtain convictions," *State ex rel. Smith* v. *Sawyer*, 263 Ore. 136, 138 (Ore. 1972), and without which petitioner would not have been convicted. The Court sought to answer this question nearly 40 years ago in *Apodaca*, but the result was a deeply fractured three-way split. Justice Powell's solo concurrence was the controlling opinion. In Justice Powell's view, the Jury Clause requires unanimity in federal criminal proceedings, but the Fourteenth Amendment leaves States free to dispense with the unanimity rule in favor of alternatives that might enable "the guilt or innocence of the accused" to be determined "more expeditiously." *Id.* at 376 (Powell, J., concurring).

Five months ago, this Court squarely repudiated the "subjective" "two-track approach to incorporation" that Justice Powell alone embraced in *Apodaca*. *McDonald* v. *Chicago*, 130 S. Ct. 3020, 3035 & n.14 (2010); see also *id.* at 3048 ("The relationship between the Bill of Rights' guarantees and the States must be governed by a single, neutral principle."). The patent conflict between *McDonald*'s and Justice Powell's approaches to incorporation is itself a compelling reason to grant the petition for *certiorari*.

But it is not only *McDonald* that undermines Justice Powell's *Apodaca* opinion. The short shrift Justice Powell gave to the unanimity requirement's intrinsic and instrumental values is inconsistent with several jurisprudential themes that run through this Court's pre- and post-*Apodaca* precedents involving the jury trial right. These precedents, viewed in their totality, strongly suggest that the unanimity rule cannot be discarded

without fundamentally diluting the jury trial right as a whole. Indeed, the empirical evidence that has developed since *Apodaca* discredits Justice Powell's hypothesis that Oregon's 10-2 rule in practice has no appreciable effect on the jury's ability to fulfill its unique constitutional function.

Besides making it numerically easier for the State to obtain a conviction, Oregon's 10-2 rule erodes the quality of the jury's deliberative process by, *inter alia*, enabling a ten-juror majority to render a guilty verdict without allowing well-founded doubts of dissenting jurors to be fully aired. As a consequence, jurors' ability to assess the trial evidence is adversely affected, disproportionately to the detriment of the accused. Furthermore, because the 10-2 rule requires the reasonable doubts of dissenting jurors to be ultimately disregarded, the rule is the functional equivalent of a judge's mid-deliberation removal of a dissenting juror without cause in order to manufacture unanimity, a plainly unconstitutional method of breaking a hung jury. Finally, by allowing the imposition of criminal punishment despite the lack of consensus within the body that the Framers' specifically designated to represent the community, the 10-2 rule undermines the important public legitimacy of guilty verdicts.

These systemic consequences of the 10-2 rule harm both defendants and the institution of the jury itself, which provides another compelling reason to revisit *Apodaca*. The Court should grant the petition and reverse the decision below.

## I. OREGON'S 10-2 RULE DILUTES THE JURY TRIAL RIGHT BY UNDERMINING THE ABILITY OF DISSENTING JURORS TO PARTICIPATE IN THE JURY'S DELIBERATIVE PROCESS.

A central theme of this Court's decisions involving the jury trial right is that an essential attribute of "an impartial jury" is that its verdict represents the product of a robust, inclusive, and coercion-free deliberation amongst individuals chosen from a fair cross section of the community. Inherently, Oregon's 10-2 rule conflicts with this constitutional ideal. The rule is not a "valuable innovation[ ]" that merely allows criminal trials to proceed more efficiently without affecting fundamental rights. *Apodaca*, 406 U.S. at 376 (Powell, J., concurring). Instead, the rule is at best the functional equivalent of other mechanisms that this Court has held unconstitutionally impair the jury's deliberative process and, by extension, the defendant's jury trial right.

### A. The Court Has Found Unconstitutional Judicial and Legislative Inventions That Compromise the Jury's Deliberative Process in the Manner That Oregon's 10-2 Rule Does.

As the Court stated in *Allen* v. *United States*, 164 U.S. 492 (1896), "[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves." *Id.* at 501. The Court has recognized that the jury must be protected from potentially coercive externalities that might unduly influence its deliberative process and thus the verdict itself, even if this means a hung jury will result. For example, the Court has held that, where a trial court "considers the jury [hopelessly] deadlocked," it must be allowed to declare a mistrial because there otherwise would be "a significant risk that a [final] verdict may result from pressures inherent in the situation rather

than the considered judgment of all the jurors." *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978); see also *Renico* v. *Lett*, 130 S. Ct. 1855, 1863 (2010) (quoting *Arizona* v. *Washington* approvingly); *Sanders* v. *Lamarque*, 357 F.3d 943, 944 (9th Cir. 2004) ("The protection of holdout jurors from coercion has been a fundamental part of our federal jurisprudence.").

Oregon's 10-2 rule turns the *Arizona* v. *Washington* approach to deadlocks on its head: Instead of declaring a mistrial so as to prevent a coercion-induced guilty verdict, an Oregon trial judge *instructs* a jury deadlocked 10-2 to return a guilty verdict. From the perspective of the defendant, the 10-2 rule is thus magnitudes worse than unlawful judicial interventions that merely have the *potential* to coerce dissenting jurors to cave to the majority. The rule is the functional equivalent of a *guarantee* that, where there are ten votes in favor of guilt, the two jurors who remain unconvinced will be struck by the trial judge for no other reason than that they stand in the way of a unanimous guilty verdict. While the 10-2 rule formally reflects a different method of disempowering holdout jurors (altering the rule of decision rather than removing them from the jury), its net effect is the exactly the same. Under Oregon's rule, the votes of the dissenting jurors may technically be *counted*; but their votes do not actually *count*.[2]

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[2] Though Oregon's rule also allows the jury to acquit by a vote of 10-2, this should not obscure the fact that it disproportionately operates to defendants' detriment. First, empirical evidence shows that the rule converts would-be deadlocks into convictions far more often than it converts would-be deadlocks into acquittals. See, *e.g.*, Calif. Admin. Office of the Courts, "Final Report of the Blue Ribbon Commission on Jury System Improvement," May 6, 1996, at 72; Harry Kalven & Hans Zeisel, THE AMERICAN JURY 56, 460-62

Viewed in such functional terms, the 10-2 rule is plainly inconsistent with the most basic notions of the right to an impartial jury. Cf. *Sanders*, 357 F.3d at 948 (holding that California state trial court "committed constitutional error when, after learning that the juror was unpersuaded by the government's case, it dismissed the lone holdout juror" without cause). This may help explain why Oregon and Louisiana are the only jurisdictions that have abandoned the historic rule of unanimity. Cf. *Burch* v. *Louisiana*, 441 U.S. 130, 138 (1979) ("We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not."). It may also explain why this Court, in cases applying the *Apprendi* rule to state convictions, has sometimes reflexively included the unanimity requirement within the core definition of the jury trial right. See, *e.g.*, *Blakely* v. *Washington*, 542 U.S. 296, 301 (2004) (describing as a "longstanding tenet[ ] of common-law criminal jurisprudence * * * that the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the unanimous suffrage of twelve or his equals and neighbours'" (quoting 4 Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769))).

The 10-2 rule does not merely affect *outcomes*; it also likely has a pernicious effect on the manner in which the deliberations unfold. The jurors know at the very *outset* of deliberations that, once 10 votes coalesce, the majority bloc may treat any remaining dissenters as irrelevant and return a verdict forthwith. Just as a parent unilaterally

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(1966). Second, as a practical matter, where the prosecution manages to convince only two of twelve jurors of the defendant's guilt, it is probably unlikely that it will re-try the defendant if the result is a mistrial.

decides when a debate with her child will end, Oregon empowers a ten-juror majority to silence even reasonable dissenters, including dissenters who may have been able to persuade the majority had they had the chance. The 10-2 rule eschews the presumption that jurors are equals and instead puts the majority bloc in charge of deciding when the proceedings will end; "deliberations may continue * * * as an option, not an obligation." Jeffrey Abramson, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 199 (2000). The 10-2 rule is thus fundamentally inconsistent with the jury's foundation as "a deliberative body, charged with the responsibility of exchanging ideas, and with the concomitant practices of arguing and influencing." *United States* v. *Fioravanti*, 412 F.2d 407, 415 (3d Cir. 1969); cf. *Allen*, 164 U.S. at 501-02 ("It cannot be that [a juror] * * * should close his ears to the arguments of men who are equally honest and intelligent as himself."); see also Richard A. Primus, *When Democracy is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1445 (1997) (arguing that the unanimity rule properly "forces decision makers to continue their discussions past the point where a less stringent decision rule would permit the process to end").

In addition to truncating deliberations, Oregon's 10-2 rule allows for the even more troubling possibility that, where two reasonable jurors have highly valid and persuasive reasons for doubting the prosecution's case, there might nevertheless be *no deliberation at all*: If the initial ballot is taken prior to deliberations and reveals ten votes in favor of conviction, the majority may immediately return a verdict without affording the dissenters an opportunity to explain and argue their position. The 10-2 rule thus flies in the face of this Court's recognition that that thorough deliberation is an essential element of the jury trial right because

"prejudices of individuals [are] frequently counterbalanced, and objectivity result[s]." *Ballew* v. *Georgia*, 435 U.S. 223, 232 (1978) (opinion of Blackmun, J.).

This Court has found unconstitutional judicial and legislative inventions designed to avoid hung juries that have far less obvious impacts on the quality of the deliberative process. For example, the Court has held that a trial court may not instruct a deadlocked jury that it "has to reach a decision." *Jenkins* v. *United States*, 380 U.S. 445, 446 (1965). And, in *Ballew*, the Court held that a five-member jury violates the Fourteenth Amendment's Due Process Clause because "progressively smaller juries are less likely to foster effective group deliberation" and more likely to impede the "meaningful * * * participation" of "minorities or other identifiable groups" in the jury process. *Id.* 435 U.S. at 222-23, 236 (opinion of Blackmun, J.).

It is difficult to reconcile Oregon's 10-2 rule with decisions such as *Jenkins* and *Ballew*. Oregon has determined that the ability of dissenting jurors to meaningfully participate in the deliberative process should be completely subordinated to the right of a majority bloc to terminate deliberations and return a verdict once it obtains ten votes. This appears far more offensive to the Framers' vision of the jury trial right than a judicial charge that only *might* coerce a holdout juror to change her vote, or a legislative rule that reduces the number of persons on the jury from six to five. Under the rule of unanimity, "power flows to the persuasive on the jury" and each juror must consider the case from everyone else's point of view in search of the conscience of the community. Each must persuade or be persuaded in turn." Abramson, *supra*, at 183, 205. By contrast, the 10-2 rule renders dissenting jurors completely powerless

if they number fewer than three. The dissenters' are left to the whim of the majority.[3]

Oregon's rule is also in tension with *Ballew*'s concerns regarding the Sixth Amendment's fair cross section requirement. To be sure, the Court has clarified that the requirement does not "require anything beyond the inclusion of all cognizable groups in the venire and the use of a jury numbering at least six persons." *Holland* v. *Illinois*, 493 U.S. 474, 478 (1990) (citations omitted). However, just as a five-member jury is unconstitutional because "the opportunity for *meaningful* * * * representation does decrease with the size of the panels," *Ballew*, 435 U.S. at 237 (opinion of Blackmun, J.) (emphasis added), Oregon's rule similarly diminishes the chances of meaningful participation "of minority groups in the community" because it allows dissenters to be ostracized both from deliberations and the rendering of a verdict.[4] In this regard, it is worth noting that it was not until three years after *Apodaca* that this Court definitively held that "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a

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[3] To be sure, the unanimity rule provides every member of the jury a sort of "veto power," but this is not analogous to the ten-juror majority's power under the 10-2 rule to render a guilty verdict, which ends the proceedings and triggers the State's right to punish. The end-game of an unbreakable deadlock is a mistrial. If the prosecution wishes to re-try the defendant, it may; if it does, the re-trial will be considered a mere "continuation" of the initial proceedings. See *Yeager* v. *United States*, 129 S. Ct. 2360, 2372 (2009) (Scalia, J., dissenting).

[4] While it is certainly not the case that split juries will always (or even often) break upon "suspect category" lines such as race or gender, they sometimes will.

jury trial." *Taylor* v. *Louisiana*, 419 U.S. 522, 529 (1975). This provides an additional reason for revisiting *Apodaca* and ending its anomalous status in constitutional law.

### B. Empirical Evidence Confirms That the 10-2 Rule Adversely Affects the Quality of the Jury's Deliberations and Decision-Making.

Empirical studies confirm the distinct possibility that the 10-2 rule impairs the jury's deliberative and decision-making processes, underscoring the importance of the question presented in Herrera's petition.

In *Apodaca*, Justice Powell conceded that it would be "contrary to basic principles of jury participation" for a majority bloc to "shut off [the] competing views" of dissenting jurors. *Id.*, 406 U.S. at 379 (Powell, J., concurring). But he found "nothing in Oregon's experience to justify the apprehension that juries not bound by the unanimity rule will be more likely" to engage in such tactics. *Ibid.* Justice White expressed a similar view in his own *Apodaca* opinion. *Id.* at 413 (opinion of White, J.).

The assumption that the jury's deliberative process is not influenced by the applicable rule of decision should have been suspect even at the time of *Apodaca*. As anyone familiar with the United States Senate can attest, whether (and how much) the applicable rule of decision protects the rights of those in the minority has substantial impact on the dynamics of a group's deliberative process. Not surprisingly, empirical studies conducted during the nearly four decades since *Apodaca* confirm that this is true of the 10-2 rule's impact on the jury.

Mock jury studies show that juries that are not bound by the unanimity rule show a marked tendency to "stop[ ] * * * deliberation when the required number [of votes are] reached." Charlan Nemeth, *Interactions Between*

*Jurors as a Function of Majority v. Unanimity Decision Rules*, IN THE JURY BOX: CONTROVERSIES IN THE COURTROOM 250 (Lawrence S. Wrightsman et al., eds. 1987); see also Abramson, *supra*, at 199 ("[T]the achievement of the minimum bloc of votes necessary for a verdict is 'psychologically binding' on bloc members."). Psychologist Reid Hastie's research similarly shows that, with respect to juries permitted to return an 8 to 4 verdict, "little occurs after the faction size reaches eight. * * * Deliberation continues for a few minutes, typically less than five"; by contrast, for those juries required to reach unanimity, "approximately 20 percent of deliberation occurs after the largest faction contains eight or more members." Reid Hastie, INSIDE THE JURY 94-98 (1983). Because Oregon's 10-2 rule makes it easier to reach the requisite number of votes as compared to the rule of unanimity, by definition Oregon's rule will result in shorter deliberations in cases where the jury is split, which are precisely the cases where thorough deliberation is the most essential. Cf. *Ballew*, 435 U.S. at 232 (opinion of Blackmun, J.) (agreeing that a "decline" in "effective group deliberation * * * leads to inaccurate factfinding"). This exacerbates the risk of wrongful convictions: "Jury research indicates that shorter deliberation leads to less accurate judgments. * * * [M]ajority rule discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable." Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1273 (2000).

The 10-2 rule also affects jurors' style of argument during deliberations. In Hastie's study, "many of the majority rule juries appeared to be quite adversarial, even combative, in contrast to a deliberate, ponderous atmosphere in many of the unanimity rule juries." Hastie, *supra*, at 112. Hastie concluded that jurors deliberating

under a majority-rule system tend to employ "a more forceful, bullying * * * style because their members realize that it is not necessary to respond to all opposition arguments when their goal is to achieve a faction size of only eight or ten members." *Ibid.*; see also Abramson, *supra*, at 203-04 (arguing that the "requirement of unanimity is indispensable to sending the right cue to jurors about what we expect of them," and "contributes to an understanding among jurors that their function is to persuade, not to outvote, one another"). Research also shows that juries that are not bound by the unanimity rule tend to be more "verdict-driven" than "evidence-driven" in their deliberations. See Hastie, *supra*, at 173-74. That is, the jurors spend less time discussing the evidence than they do on cobbling together enough votes to reach a verdict and go home.

This has serious consequences with respect to the quality of the jury's fact-finding: Evidence-driven juries tend to "exhibit a somewhat higher level of reasoning than [those] who do not deliberate," to be "more aware of alternative theories and evidence that did not support their selected verdict, and [to] match evidence to alternative verdict options more systematically." Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 348 (2003). Verdict-driven juries, by contrast, are less likely to question their own views or correct each other's errors. See John Guinther, THE JURY IN AMERICA 81 (1988); cf. also Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L. J. 71, 118-19 (2000) (explaining that majority-rule deliberations often exhibit "group polarization," where individuals simply reinforce their own preconceptions by talking amongst themselves and excluding others with differing points of view).

The net effect is that the 10-2 rule adversely affects the accuracy of verdicts. Discarding the unanimity rule thus impairs an essential safeguard in the doling out of criminal punishment. See Gary J. Jacobsohn, *The Unanimous Verdict: Politics and the Jury Trial*, 1977 WASH. U. L. Q. 39, 52 (1977).

Notably, the Oregon data show that the State's experience with the 10-2 rule is entirely consistent with the empirics discussed above. According to a recent study of Oregon state criminal trials, non-unanimous verdicts were reached in at least 41 percent of the 662 cases included in the sample. See Oregon Office of Public Defense Services Appellate Division, "On the Frequency of Non-Unanimous Felony Verdicts in Oregon: A Preliminary Report to the Oregon Public Defense Services Commission," May 21, 2009, at 3; accord Harry Kalven & Hans Zeisel, THE AMERICAN JURY 460 (1966). By comparison, nationwide studies have estimated that, in jurisdictions using the rule of unanimity (*i.e.*, every jurisdiction but Oregon and Louisiana), juries hang by one or two jurors in only 2 to 3 percent of all tried cases. See William S. Neilson & Harold Winter, *The Elimination of Hung Juries: Retrials and Nonunanimous Juries*, 25 INT'L REV. L. & ECON. 1, 1-2 (2005). There is no reason to believe that Oregon's hung jury rate would be significantly higher than the nationwide average were the State to employ the unanimity rule.[5] Thus, the large delta between the percentage of Oregon trials resulting in 10-2 or 11-1 verdicts and the percentage of trials nationwide that result in 10-2 or 11-1 deadlocks suggests that Oregon juries are routinely rendering split guilty verdicts

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[5] It is possible, however, that the 10-2 rule encourages Oregon prosecutors to bring to trial questionable cases that they might not otherwise bring if the rule of unanimity applied.

not only in cases where they would otherwise have hung, but also in cases where additional deliberation would have led to consensus.

To be sure, had the rule of unanimity applied, in some cases the additional deliberation that would have followed would have converted the jury's initial 10-2 or 11-1 split in favor of conviction into a 12-0 guilty verdict. However, the empirical evidence of jury behavior supports the hypotheses that, had the rule of unanimity applied, **(1)** some of these juries would have hung on the basis of the dissenters' conscientiously held doubts about the prosecution's case, and **(2)** even more troubling, some of these juries would have actually *acquitted* the defendant. See Valerie P. Hans et al., *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33, 47 (2003) (finding that, in a sample of cases where the first ballot revealed a strong majority in favor of conviction, juries ultimately acquitted the defendant 12 percent of the time); Kalven & Zeisel, *supra*, at 488 (making a similar finding). There is therefore good reason to believe that Oregon's 10-2 rule is eroding the capacity of Oregon juries to discharge their historic function of guarding against wrongful convictions.

As the Court suspected in *Ballew*, the length and quality of deliberations matter, and the rule of unanimity is far superior to Oregon's 10-2 rule in this respect. The exact heroic portrait offered in the film "12 Angry Men," where one holdout manages to turn an entire jury around, may not be common. But, as Hans and Kalven and Zeisel have shown, the ability of dissenters to gradually persuade fellow jurors that there is reasonable doubt is not merely the stuff of movie fiction.

Under the 10-2 rule, however, a jury split 10 to 2 in favor of conviction on the first ballot may very well return a guilty verdict immediately; the dissenting jurors may

not even get the *chance* to argue their views of the evidence. This demonstrates the larger truth that the persuasive power of those who are initially in the minority depends upon the existence of a rule of decision that compels the majority to engage in deliberation. See Jeffrey Abramson, *Anger at Angry Jurors*, 82 CHI-KENT L. REV 591, 592 (2007). It also underscores that the rule of unanimity provides the defendant critical protections similar to the reasonable doubt requirement and is thus equally fundamental to due process.

## II. HUNG JURIES SHOULD NOT BE CONSIDERED WASTEFUL INEFFICIENCY THAT MUST BE ELIMINATED.

Justice Powell's opinion in *Apodaca* was at least partly driven by his view that Oregon's 10-2 rule served the legitimate interest of minimizing "the potential for hung juries occasioned either by bribery or juror irrationality." *Id.*, 406 U.S. at 377 (Powell, J., concurring). While Oregon concededly has a compelling interest in ensuring that jurors acting in bad faith do not jam its machinery of justice, the 10-2 rule is clearly not narrowly tailored to that rare problem. Nor was it ever intended to be. The rule was adopted by referendum in 1934, and it "clearly appears from * * * the Voters' Pamphlet that the amendment was intended to make it easier to obtain convictions." *Sawyer*, 263 Ore. at 138.

Yet, there is no discernible State interest in enabling the prosecution to obtain a conviction where one or two reasonable jurors, acting in good faith and after honest deliberations, still harbor well-founded doubts of the defendant's guilt.[6] Just as it has done in its *Apprendi* line

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[6] There already exist mechanisms by which a court may strike jurors who act irrationally or in bad faith. See *Arizona* v.

of cases, the Court should not hesitate to hold that the desire to streamline the imposition of criminal punishment is not an acceptable reason to abandon the Framers' understanding of the jury trial right and the bright-line rule of unanimity. Cf. *Blakely*, 542 U.S. at 313.

The argument that abandoning the rule of unanimity will minimize the inefficiency associated with narrowly hung juries is not only out of step with this Court's Sixth Amendment jurisprudence; it is also based on two erroneous assumptions. First, it wrongly assumes that hung juries are such a significant administrative problem that they warrant the radical "solution" of abandoning the historic rule of unanimity. There is no definitive evidence that they are. A thirty-state survey conducted by the National Center for State Courts found that juries in felony trials hung at a rate of 6.2 percent, with some slightly higher rates in certain California counties. See Valerie P. Hans et al., "Are Hung Juries a Problem? Final Report of the National Center for State Courts to National Institute of Justice," September 30, 2002, at 20. This rate is essentially unchanged from the 5.5 percent rate that

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*Washington*, 434 U.S. at 509. What is emphatically disallowed is removing jurors simply because they disagree with the prosecution's view of the evidence. See, *e.g.*, *United States* v. *Brown*, 823 F.2d 591, 596 (D.C. Cir. 1987) ("[I]f the record evidence discloses *any possibility* that the request to discharge stems from the juror's view of the sufficiency of the government's evidence, the court must deny the request." (emphasis added)); *United States* v. *Symington*, 195 F.3d 1080, 1087 (9th Cir. 1999) ("[I]f the record evidence discloses *any reasonable possibility* that the impetus for a juror's dismissal stems from the juror's views on the merits of the case, the court must not dismiss the juror." (emphasis added)). Yet this is how the 10-2 rule functionally operates.

Kalven and Zeisel reported in their study of data from the 1950s. See Kalven & Zeisel, *supra*, at 56, 461-62.

Second, the argument assumes that narrowly hung juries are typically the result of the holdouts' irrationality, as opposed to real problems with the trial evidence. Empirical studies refute this assumption. See Kalven & Zeisel, *supra*, at 462-63 (concluding that the "ambiguity of the case * * * must be the primary cause of a hung jury," not "an eccentric juror * * * refus[ing] to play his proper role"); accord Hans, "Are Hung Juries a Problem?" *supra*, at 45, 49.

According to Kalven and Zeisel, "for one or two jurors to hold out to the end," it is typically "necessary that they had companionship at [least at] the beginning of deliberations." Kalven & Zeisel, *supra*, at 462-63. If, on the one hand, the views of a holdout juror are initially shared by others at the beginning of deliberations, this is a good indication that those views are reasonable, because presumably juries rarely (if ever) include multiple "irrational" members. Accordingly, in such circumstances, an eventual 10-2 or 11-1 deadlock cannot be viewed as the product of juror irrationality. If, on the other hand, the holdout is alone in her views from the start yet still manages to resist the majority, she must either have highly valid reasons for her views or be so incredibly irrational as to be preternaturally immune from the inherent pressures of the majority that Kalven and Zeisel observed. If the holdout's resistance owes to the former, it is worthy of respect; if it owes to the latter, this will likely be readily evident to the trial court—irrationality of the incredible variety is presumably difficult to conceal—and thus the holdout may be lawfully removed.

In sum, the typical hung jury is not properly considered an expendable inefficiency in the system.

Rather, it demonstrates that the rule of unanimity is linked with the other constitutional requisites of due process (*e.g.*, the reasonable doubt requirement) that give the jury its historic and essential role of protecting the accused against wrongful convictions and government overreaching. Cf. Theodore Eisenberg et al., *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven and Zeisel's* THE AMERICAN JURY, 2 J. EMPIRICAL LEG. STUD. 171, 185-87 (2005) (concluding that juries have a higher "conviction threshold" than judges).

Perhaps there are some cases in which one or two rogue jurors manage to escape the trial court's detection and hang a jury. But discarding the deeply rooted rule of unanimity is an overbroad, unconstitutional solution to a problem that, at most, occurs highly infrequently. Cf. *McDonald*, 130 S. Ct. at 3047 (holding that Chicago's sweeping ban was invalid even though narrower prohibitions, such as prohibiting felons' gun ownership, are constitutional).

## III. THE RULE OF UNANIMITY IS ESSENTIAL TO THE PROTECTION OF THE JURY'S PUBLIC LEGITIMACY.

"One of the key functions of the criminal jury system is to legitimize, in the eyes of the community, the state's use of its coercive powers." Abramson, *supra*, at 202. This helps explain the Court's reluctance to embrace rules that might "impugn the legitimacy" of jury verdicts. *Yeager* v. *United States*, 129 S. Ct. 2360, 2370 (2009). For example, in *Tanner* v. *United States*, 483 U.S. 107 (1987), the Court refused to allow the defendant's request for "post-verdict investigation into juror misconduct" because the "community's trust in a system that relies on the decisions of laypeople would all be undermined by a barrage of post verdict scrutiny of juror conduct." *Id.* at 121.

The concern for legitimacy is also an animating feature of the Court's decisions involving governmental efforts to manipulate the make-up of the jury. See *Miller-El* v. *Dretke*, 545 U.S. 231, 238 (2005) (stating that "a prosecutor's discrimination invites cynicism respecting the jury's neutrality and undermines public confidence in adjudication" (quotations omitted)); see also *Taylor*, 419 U.S. at 530 ("Community participation in the administration of the criminal law * * * is also critical to public confidence in the fairness of the criminal justice system.").

The special need to ensure the public legitimacy of verdicts also helps explain why the mere *appearance* of unfairness is sometimes treated as grounds for automatic reversal. See, *e.g.*, *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (vacating, without engaging in harmless error review, defendant's conviction where the judge had a financial interest in a guilty verdict).

The unanimity rule is instrumental in ensuring that jury verdicts retain public legitimacy. Cf. *McDonald*, 130 S. Ct. at 3047-48 (rejecting the argument that "incorporation of a right turns on whether it has intrinsic as opposed to instrumental value"). That may be one reason for the unanimity requirement's historical pedigree. Cf. *Waller* v. *Georgia*, 467 U.S. 39, 49 n.9 (1984) ("While the benefits of a public trial are frequently intangible, difficult to prove, or a matter of chance, the Framers plainly thought them nonetheless real.").

The legitimacy of a jury's verdict depends not just on the content of its decision, but also the process by which it is reached. Cf. Primus, *supra*, at 1427; *Burch*, 441 U.S. at 135 (stating that an "essential feature" of the jury system is the "community participation and shared responsibility that results from that group's determination of guilt or innocence"). Because the jury's deliberations are

secretive, its verdict is the public's proxy for determining what went on in the deliberation room. Where the verdict is unanimous, the public is provided an indirect yet strong assurance that the jury was not marred by schisms along racial, socio-economic, religious, or similar lines. This gives even substantively unpopular verdicts an air of legitimacy. This might be why public confidence in the jury system remains extremely high despite media focus on controversial verdicts. See Robert J. MacCoun & Tom R. Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency*, 12 LAW & HUM. BEHAV. 333, 338 tbl.2 (1988) (reporting that public confidence in the jury system is around 90 percent).

By allowing a verdict to be rendered over the dissenting views of two jurors, Oregon's 10-2 rule invites public doubt over the integrity of the deliberative process. If, for example, a jury composed of ten white jurors and two racial minorities returns a 10-2 guilty verdict, the public may speculate that the jury broke upon racial lines and that racial tensions corrupted the deliberative process. If the jury is polled and it turns out (even if just by coincidence) that the racial minority jurors were the dissenters, the public's suspicions will be even more pronounced. The damage that this would do to the public's confidence in the jury system is immeasurable. Cf. *Georgia* v. *McCollum*, 505 U.S. 42, 49 (1992).

This public legitimacy concern is not limited to scenarios in which the jury's verdict may have split on racial or similar lines. Such concerns are triggered whenever the jury fractures on *any* discernible line. The public might hypothesize that the jury's split verdict reflected not so much the evidence as the luck of the draw—had the jury's demographical composition been

even slightly different, so too would the outcome. The unanimity requirement is a prophylactic against this type of post-verdict analysis: the jury's consensus signals that any randomly picked group of twelve reasonable individuals probably would have reached the same unanimous result. Simply put, the rule of unanimity is indispensible to ensuring that the jury's verdict "represents the community's collective judgment regarding all the evidence and arguments presented to it." *Yeager*, 129 S. Ct. at 2368.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition and reverse the decision below.

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No. 10-344

Supreme Court, U.S.
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# In The
# Supreme Court of the United States

ALONSO ALVINO HERRERA,

*Petitioner,*

v.

STATE OF OREGON,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Oregon**

## BRIEF OF SHARI SEIDMAN DIAMOND, VALERIE HANS, KENNETH S. KLEIN, STEPHAN LANDSMAN, MICHAEL SAKS, RITA SIMON, AND NEIL VIDMAR AS AMICI CURIAE IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

Whether the Sixth Amendment, as incorporated against the States by the Fourteenth, likewise requires a unanimous jury verdict to convict a person of a crime.

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OREGON OFFICE OF PUBLIC DEFENSE SERVICE APPELLATE DIVISION, A PRELIMINARY REPORT TO THE OREGON PUBLIC DEFENSE SERVICES COMMISSION (May 21, 2009), available at http://www.oregon.gov/OPDS/docs/Reports/PDSCReportNonUnanJuries.pdf?ga=t ..... 7

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## INTEREST OF AMICI CURIAE[1]

Amici are law school professors whose teaching and scholarship has addressed the empirical and constitutional questions about jury unanimity. Amici are identified in the Appendix.

## SUMMARY OF ARGUMENT

This brief summarizes the implications of the empirical work on the consequences of requiring, or not requiring, unanimity. The Petition for Writ of Certiorari argues that unanimity is a fundamental right protected by the Fourteenth Amendment. This amici brief develops a sister-argument – requiring unanimity promotes empirically demonstrable benefits, while imposing at most *de minimus* costs.

## ARGUMENT

Empirical evidence paints a nuanced picture of the consequences of a unanimity requirement. Requiring unanimity lengthens deliberations, promotes mature deliberations, promotes consideration of

[1] This brief was drafted exclusively by the named amici. Neither party nor their counsel made any monetary contribution to the preparation or submission of this brief.

The parties were notified ten days prior to the due date of this brief of the intention to file; they have consented to the filing of this brief.

minority viewpoints, reduces the incidence of factual error, increases community, juror, and litigant confidence in verdicts, and slightly increases hung jury rates.

When unanimity is not required, jurors tend to end their deliberations soon after the required quorum is reached. A study examining the deliberations of actual Arizona civil juries in which only six of eight jurors had to agree to the verdict found that jurors were quite conscious that they needed only a six-to-two majority in order to return a verdict. Shari Seidman Diamond, Mary R. Rose, and Beth Murphy, *Revising the Unanimity Requirement: The Behavior of the Non-unanimous Jury*, 100 NW. U. L. REV. 201 (2006). On some juries the majority attempted to persuade those in the minority even when their votes were not required; on other juries, the majority relied on the fact that they were permitted to deliver a majority verdict, terminated any attempt to resolve differences, and ended the debate when the required minimum vote was reached. On those juries, once the requisite majority was achieved, dissenting views were dismissed.

Experimental studies confirmed the conclusion suggested by the study of Arizona juries – simulated juries deliberated longer when they were required to be unanimous than when they were permitted to reach non-unanimous verdicts. See James H. Davis, Norbert L. Kerr, Robert S. Atkin, Robert Holt, and David Meek, *The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. PERSONALITY & SOC.

PSYCHOL. 1 (1975); Dennis L. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying, and Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. (2001); Robert D. Foss, *Group Decision Processes in the Simulated Trial Jury*, 39 SOCIOMETRY 305 (1976); REID HASTIE, STEVEN PENROD, AND NANCY PENNINGTON, INSIDE THE JURY (1983); Charlan Nemeth, *Interactions Between Jurors as a Function of Majority vs. Unanimity Decision Rules*, 7 J. APPLIED SOC. PSYCH. 38 (1977); and MICHAEL J. SAKS, JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULE (1977).

Post-trial evaluations by real jurors deliberating under a non-unanimous decision rule revealed that jurors who reached unanimous verdicts rated their deliberations as more thorough than both majority and holdout jurors who served on juries that ended with non-unanimous verdicts. Diamond et al. (2006). Juries required to reach unanimity rated those deliberations as more thorough than juries assigned to a non-unanimous decision rule. Devine et al. (2001); HASTIE et al. (1983).

Several experimental jury simulation studies have found that jurors holding minority views participate less and are seen as less influential when unanimity is not required. Valerie P. Hans, *The Power of Twelve: The Impact of Jury Size and Unanimity on Civil Jury Decision Making*, 4 DEL. L. REV. 1 (2001); VALERIE P. HANS AND NEIL VIDMAR, JUDGING THE JURY, 174-75 (1986); HASTIE et al. (1983); David A. Vollrath

and James H. Davis, *Jury Size and Decision Rule*, in THE JURY: ITS ROLE IN AMERICAN SOCIETY ch. 5 (Rita J. Simon ed., 1980). Minority jurors operating under a majority decision rule are less likely to report that they made the arguments that they wanted to make, compared to minority jurors deliberating under a unanimity rule. Norbert L. Kerr, Robert S. Atkin, Garold Stasser, David Meek, Robert W. Holt, and James H. Davis, *Guilt Beyond a Reasonable Doubt: Effects of Conceptual Definition and Assigned Rule on the Judgment of Mock Juries*, 34 J. PERSONALITY & SOC. PSYCHOL. 282 (1976). As a juror in a majority with enough members to reach a verdict told a fellow juror in the minority during deliberations in an Arizona civil trial, "no offense, but we are going to ignore you." Diamond et al. (2006), at 216.

Recently, the National Center for State Courts conducted a study of the causes of hung juries in felony trials in four jurisdictions, all of which require jury unanimity. Paula Hannaford-Agor, Valerie P. Hans, Nicole L. Mott, and G. Thomas Munsterman, *Are Hung Juries a Problem?* (2002), available at http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesPub.pdf; Valerie P. Hans, Paula L. Hannaford-Agor, Nicole L. Mott, and G. Thomas Munsterman, *The Hung Jury: The American Jury's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33 (2003). Questionnaires from approximately 3500 jurors provided information on the jury's first ballots and final verdicts. In most cases, a verdict was reached and the verdict favored by a majority on the

first ballot prevailed. Notably, in over ten percent of the cases, jurors who favored a minority position at the time of the first ballot were able to convince the majority jurors to adopt the minority's favored verdict. Valerie P. Hans, *Deliberation and Dissent: 12 Angry Men Versus the Empirical Reality of Juries*, 82 CHI-KENT L. REV. 579, 583, Figure 1 (2007). Empirical studies of grand juries, which do not have a unanimity requirement, find that the group does not consider minority points of view. Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 93 & n.113 (1993).

Requiring unanimity increases the frequency of hung juries, but only slightly. Juries required to reach unanimity are more likely to hang than juries permitted to arrive at a verdict without obtaining consensus, but the available data suggest that the difference is modest, approximately 5.6% versus 3.1%. HARRY KALVEN, JR. AND HANS ZEISEL, THE AMERICAN JURY (1966), at 461. The reason for this modest difference is that hung juries are rarely caused by one or two jurors who are consistently at odds with the rest of the jury. Rather, hung juries are most likely when the jury is initially more evenly divided. For example, in the National Center for State Courts study of felony juries, in those cases in which only one or two jurors were in the minority on the first ballot, only 2.9% ended with a hung jury. Hannaford-Agor et al. (2002), at 66, Table 5.2. In the 83 percent of the cases in which hung juries did occur, the minority position

was initially supported by at least three jurors. (*Id.*). This result replicates a tentative finding reported by Kalven and Zeisel, showing that hung juries tend to occur only when a substantial minority exists, rather than when a single eccentric juror or even two jurors refuse to see reason. KALVEN AND ZEISEL (1966). Jury deadlocks predominantly reflect genuine disagreement over the weight of the evidence, rather than the irrationality or stubbornness of one or two unreasonable jurors. When deliberations begin with an overwhelming majority favoring one verdict or the other, they are highly unlikely to end in a hung jury.

Jurors themselves are less confident in the accuracy of their own verdicts when they are not required to agree unanimously. HASTIE et al. (1983); SAKS (1977); Nemeth (1977). Community residents who rated the procedures used in jury trials viewed unanimous procedures as fairer and more accurate than non-unanimous procedures. Robert J. MacCoun and Tom Tyler, *The Basis of Citizens' Perceptions of the Criminal Jury: Procedural Fairness, Accuracy, and Efficiency,* 12 LAW & HUM. BEHAV. 333 (1988). Jury deliberation has been demonstrated as the key element of the jury system that promotes its soundness as a fact finder. Dennis J. Devine, Jennifer Buddenbaum, Stephanie Houp, Dennis P. Stolle and Nathan Studebaker, *Deliberation Quality: A Preliminary Examination in Criminal Juries*, 4 J. EMPIRICAL LEGAL STUD. 273 (2007).

Actual data *from Oregon* aptly illustrates the interplay between hung jury rates, consideration of

minority viewpoints, and allowing conviction without unanimity. The hung jury rate nationally is approximately 5.6%. In Oregon, according to a recent study, the hung jury rate in felony cases in 2007 was 3.2%, and in 2008 was 2.5%. OREGON OFFICE OF PUBLIC DEFENSE SERVICE APPELLATE DIVISION, A PRELIMINARY REPORT TO THE OREGON PUBLIC DEFENSE SERVICES COMMISSION (May 21, 2009) p. 4, available at http://www.oregon.gov/OPDS/docs/Reports/PDSCReportNonUnanJuries.pdf?ga=t. Most notably, however, the Oregon juries reached a non-unanimous verdict on at least one count in *65.5%* of cases. (*Id.*) Eliminating the requirement of unanimity in Oregon apparently garnered a less than 3% increase in conviction rates, but truncated fully accounting for minority viewpoints in over 65% of deliberations.

So, where does this leave matters when thinking about a unanimity requirement? First, the primary perceived downside of requiring unanimity – having a less efficient system with longer deliberations and more hung juries – while real, is manageable. Forty-eight states require unanimity, and report no difficulties with an efficient justice system reaching verdict in the vast majority of cases. While requiring unanimity does result in an incremental increase in hung juries, the total "increase" is less than 3%.

By contrast, requiring unanimity results in a variety of benefits. And some of these benefits are of constitutional import. Unanimity increases public confidence in jury verdicts; in *Taylor v. Louisiana* this Court recognized that cross-sectionalism in jury

venires, panels or lists "is essential to the fulfillment of the Sixth Amendment" in part because community participation in the administration of criminal law is "critical to public confidence in the fairness of the criminal justice system."[2] Unanimity reduces the risk of convictions resting on factual error; in *Cage v. Louisiana* this Court held that the reasonable doubt standard is mandated by the Fourteenth Amendment because "'[i]t is a prime instrument for reducing the risk of convictions resting on factual error.'"[3]

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[2] 419 U.S. 522, 526, 530 (1975).

[3] 498 U.S. 39, 39-40 (1990), *disapproved of on other grounds*, Estelle v. McGuire, 502 U.S. 62, 72 n. 4 (1991). *Cage* quotes from *In re Winship*; *Winship* actually links the importance of accuracy of fact finding and public confidence in verdicts. 397 U.S. 358, 364 (1970).

## CONCLUSION

This case presents the opportunity for this Court to recognize that constitutionally enshrined values and converging empirical evidence demand the requirement of unanimity. The amici encourage this Court to do so.

Respectfully submitted,

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**In The Supreme Court of the United States**

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ALONSO ALVINO HERRERA,
*Petitioner*,

v.

THE STATE OF OREGON,
*Respondent*.

On Petition for Writ of Certiorari to the Oregon Court of Appeals

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# BRIEF OF *AMICUS CURIAE* THE FEDERAL PUBLIC DEFENDER FOR THE DISTRICT COURT OREGON IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*[1]

The Federal Public Defender for the District of Oregon seeks leave to file as an *amicus curiae* on the Petition for Writ of *Certiorari*, whether a criminal conviction based on a non-unanimous jury poll violates the Sixth Amendment as applied to the States through the Fourteenth Amendment.[2]

The Federal Public Defender for the District of Oregon has a twenty-five year history of active representation of petitioners in actions pursuant to 28 U.S.C. § 2254, before the United States District Court for the District of Oregon and the United States Court of Appeals for the Ninth Circuit. A significant portion of these actions involve convictions by non-unanimous jury polls, which is allowed in Oregon for all crimes save capital murder pursuant to the Constitution of the State of Oregon, Article I, Section 11 and Or. Rev.

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[1] Pursuant to Rule 37.3, counsel for *amicus* state that the parties have consented to the filing of this brief; letters of consent from the parties have been submitted to the Clerk of Court. Pursuant to Rule 37.6, counsel for *amicus* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

[2] *Amicus curiae* believes that the requirement for unanimity is grounded in the right to proof beyond a reasonable doubt based in either the jury trial protections of the Sixth Amendment or the Due Process protections of the Fifth and Fourteenth Amendments. Regardless of where the right is based, it is a fundamental component of the American system of justice.

Stat. § 136.450. While many of those cases raise procedural questions not at issue here, the Federal Public Defender is aware that over the next few years numerous additional cases in which the issue has been preserved in the Oregon courts will move into federal court.

Statistics made available by the Oregon Justice Department reflect that for the calendar year of 2007, there were a total of 37,716 felony cases filed in the State of Oregon. *See* www.ojd.state.or.us./osca/-documents/2007_Stats_Table_6_001.pdf ("2007 Statistics"). The Oregon courts report a total of 30,461 felony cases were filed in 2008, and 2009 saw a total of 29,479 felony filings. *See* www.courts.oregon.gov/-OJD/docs/OSCA/2009_Stats_Table_1.pdf. Through August 27, 2010, there has been a total of 14,601 felony filings. *See* www. courts.oregon.gov/OJD/docs/-OSCA/2010_Stats_Table_1.pdf. The vast majority of criminal convictions in Oregon, as with other jurisdictions, are pursuant to a guilty plea. Available statistics indicate that just under 3% of felony cases proceed through a jury trial. *See* 2007 Statistics, *supra*. The Oregon Department of Justice recently attempted to quantify non-unanimous jury verdicts, and while not definitive the summary indicated that of the 662 trial cases surveyed, juries were polled in the 63% of the cases and just over 65% of the polls were non-unanimous on at least one count. *See* www.-oregon.gov/OPDS/docs/Reports/PDSCReportNonUnan-Juries.pdf?ga=tcases.

Even with less than 3% of all felony cases resulting in a jury trial, with up to two-thirds of the

votes being non-unanimous, there are still slightly over 2,000 individuals who have been incarcerated since 2007 based, at least in part, on such verdicts.

It has become a norm to raise and preserve the non-unanimous jury issue at the trial and appellate level pending the eventual resolution of the question by this Court. A ruling on this substantive issue will have direct impact on numerous cases pending before the states courts, and soon to be pending in the federal courts, in the district of Oregon.

## STATEMENT OF THE CASE

*Amicus curiae* joins the statement of the case presented by counsel for Petitioner. As noted in the petition, Oregon and Louisiana are the only two jurisdictions allowing individuals to be convicted of a felony by a non-unanimous jury poll. *See* Sheri Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U.L. REV. 201, 203 (2006) ("jury verdicts in felony trials must be unanimous in federal courts and in all states except Louisiana and Oregon").

## SUMMARY OF ARGUMENT

Depriving an individual of his liberty and freedom based on a non-unanimous jury poll is a violation of fundamental rights including the right to a trial by jury, to proof beyond a reasonable doubt, and to due process, as guaranteed in criminal trials in state courts by the Sixth and Fourteenth Amendments

to the Constitution of the United States. *Amicus curiae* joins the Petitioner's legal analysis on these issues, and as previously presented in the *amicus curiae* filing in support of the petition for writ of *certiorari* filed in *Lee v. Louisiana*, 129 S. Ct. 130 (2008) (No. 07-1536) and *Bowen v. Oregon*, 130 S. Ct. 52 (2009) (No. 08-1117).

*Amicus curiae* writes to address why the deprivation of an individual's liberty based on a non-unanimous jury poll is incompatible with the protections afforded by the Constitution of the United States, and particularly the rights guaranteed by the Sixth Amendment and incorporated to the States through the Fourteenth Amendment.

Based on this analysis, and that submitted by the Petitioner, *amicus curiae* joins in urging this Court to accept *certiorari* and reaffirm our constitutional guarantee that no individual may be deprived of his liberty unless the state has "suffer[ed] the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours'[.]" *Blakely v. Washington*, 542 U.S. 296, 313-314 (2004) (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)).

## ARGUMENT

### I. The Sixth Amendment Analysis Set Forth In *Apodaca/Johnson* That Left Standing Convictions By Non-Unanimous Jury Polls Is Incompatible With This Court's Recent Jurisprudence.

#### A. The Analysis in *Apodaca/Johnson*.

In *Duncan v. Louisiana*, 391 U.S. 145, 148-149 (1968), this Court confirmed that the Sixth Amendment right to a jury trial applied to state court criminal proceedings through incorporation via the Due Process Clause of the Fourteenth Amendment. Two years later the Court was asked to consider whether a conviction based on a non-unanimous jury poll was compatible with these rights in cases in the companion cases of *Johnson v. Louisiana*, 406 U.S. 366 (1972) and *Apodaca v. Oregon*, 406 U.S. 404 (1972) (*plurality*).

The cases arose from the only two jurisdictions that allowed felony convictions by non-unanimous juries, Oregon and Louisiana, which remains true to this day. The cases bracketed the decision in *Duncan v. Louisiana*. Note, *Non-Unanimous Jury Verdicts*, 86 HARV. L. REV. 148, 148-149 (1972). Because *Johnson* pre-dated *Duncan*, that matter challenged the non-unanimity based primarily on the Fourteenth Amendment. *Apodaca* post-dated *Duncan*, and thus rested his contentions on the Sixth Amendment, arguing that unanimity under the Sixth Amendment was critical for giving meaning to the requirement for

proof beyond a reasonable doubt. As the Court explained:

> Petitioners nevertheless argue that unanimity serves other purposes constitutionally essential to the continued operation of the jury system. Their principal contention is that a Sixth Amendment 'jury trial' made mandatory on the States by virtue of the Due Process Clause of the Fourteenth Amendment, *Duncan v. Louisiana, supra*, should be held to require a unanimous jury verdict in order to give substance to the reasonable-doubt standard otherwise mandated by the Due Process Clause. See *In re Winship*, [397 U.S. 358 (1970)].

*Apodaca*, 406 U.S. at 411.

No majority was reached. Several justices opined that the Sixth Amendment guaranteed neither proof beyond a reasonable doubt nor a unanimous jury in any criminal case:

> Petitioners' argument that the Sixth Amendment requires jury unanimity in order to give effect to the reasonable-doubt standard thus founders on the fact that the Sixth Amendment does not require proof beyond a reasonable doubt at all.

*Apodaca*, 406 U.S. at 412, & 407-408 (White, J., joined by Warren, C.J., Blackmun, J., and Rehnquist, J.). Other justices believed that those guarantees had always been contained in the Sixth Amendment and must apply equally to criminal trials before any state court via the due process provisions of the Fourteenth Amendment:

> In *Duncan v. Louisiana*, [*supra*] the Court squarely held that the Sixth Amendment right to trial by jury in a federal criminal case is made wholly applicable to state criminal trials by the Fourteenth Amendment. Unless *Duncan* is to be overruled, therefore, the only relevant question here is whether the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict of the jury must be unanimous. The answer to that question is clearly 'yes,' as my Brother Powell has cogently demonstrated in that part of his concurring opinion that reviews almost a century of Sixth Amendment adjudication.

*Apodaca*, 406 U.S. at 414 (Stewart, J., joined by Brennan and Marshall, dissenting)

The plurality analysis of the Sixth Amendment rights at issue in *Apodaca* ultimately turned on whether those rights were fully incorporated to the states through the Fourteenth Amendment, or whether the Sixth Amendment rights that were

incorporated were less stringent than those mandated in federal trials. Justice Powell, writing for himself alone in a concurring opinion, concluded that the Sixth Amendment rights were not fully incorporated:

> I concur in the plurality opinion in this case insofar as it concludes that a defendant in a state court may constitutionally be convicted by less than a unanimous verdict, but I am not in accord with a major premise upon which that judgment is based. Its premise is that the concept of jury trial, as applicable to the States under the Fourteenth Amendment, must be identical in every detail to the concept required in federal courts by the Sixth Amendment. I do not think that all of the elements of jury trial within the meaning of the Sixth Amendment are necessarily embodied in or incorporated into the Due Process Clause of the Fourteenth Amendment.

*Johnson*, 406 U.S. at 366 (Powell, J., concurring).

Thus, the plurality analysis of the Sixth Amendment that left standing convictions by non-unanimous juries in *Apodaca/Johnson* were founded on two possible theories: that the Sixth Amendment did not require proof beyond a reasonable doubt in criminal trials, or that if required in federal criminal trials, that constitutional right was not incorporated to state court criminal trials through the Fourteenth

Amendment. Both of those theories have been rejected by this Court's recent jurisprudence.

### B. This Court's Recent Jurisprudence Confirms The Right To Proof Beyond a Reasonable Doubt as a Component of the Jury Trial Guarantee.

In a series of decisions starting with *Jones v. United States*, 526 U.S. 227 (1999), this Court has analyzed the protections of the Sixth Amendment, including the questions of whether those protections guarantee the right to proof beyond a reasonable doubt of every fact alleged by the state that supports a deprivation of liberty. This Court has repeatedly and consistently answered 'yes' to that question.

In *Jones*, this Court held simply that the Sixth Amendment guarantees the right to have any fact that is an element of the offense "submitted to a jury, and proven by the Government beyond a reasonable doubt." 526 U.S. at 232.

This Court next addressed the issue in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), citing *Jones* to confirm that proof beyond a reasonable doubt in criminal trials is guaranteed both by the Due Process Clause of the Fifth Amendment and the jury trial guarantees of the Sixth Amendment:

> We [in *Jones*] noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees

> of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.*, at 243, n. 6, 119 S. Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

*Apprendi*, 530 U.S. at 476.

This Court confirmed this analysis two years later in *Ring v. Arizona*, 536 U.S. 584 (2002):

> The dispositive question, we said, "is one not of form, but of effect." [*Apprendi*, 530 U.S.] at 494, 120 S. Ct. 2348. If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt

536 U.S. at 602. [3]

Two years after *Ring*, this Court revisited the issue and explicitly recognized that the requirement for proof beyond a reasonable doubt to a unanimous

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[3] In doing so, this Court overturned the prior ruling of *Walton v. Arizona*, 497 U.S. 639 (1990), noting that *Walton* was incompatible with its analysis of its Sixth Amendment rights recognized in *Apprendi*. *Ring*, 536 U.S. at 609.

jury was within the Framer's original intent for the Sixth Amendment:

> The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," 4 Blackstone, Commentaries, at 343, rather than a lone employee of the State.

*Blakely*, 542 U.S. at 313-14.

Three years later in *Cunningham v. California*, 549 U.S. 270 (2007), this Court confirmed that it has:

> [R]epeatedly held that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.

549 U.S. at 281.

While these cases involved facts justifying a greater sentence after a defendant had been convicted either by a plea or by a unanimous jury verdict, there is no basis to distinguish the determination of guilt of any crime in the first instance.

Given the clear and consistent statements of this Court in *Jones*, *Apprendi*, *Ring*, *Blakely* and then *Cunningham*, there can be no dispute that the jury trial guarantees of the Sixth Amendment include the right to proof beyond a reasonable doubt at all criminal trials.

### C. This Court's Recent Jurisprudence Rejects Any Partial Incorporation of These Sixth Amendment Rights.

As *Apprendi*, *Ring*, *Blakely*, and *Cunningham* involved state court criminal proceedings, the incorporation of these Sixth Amendment rights to such proceedings was implicit.

More recently, a majority of this Court addressed the partial incorporation theory of Justice Powell in *McDonald v. City of Chicago, Ill.*, _ U.S. _, 130 S. Ct. 3020 (2010). Noting the unusual split that was resolved by the partial incorporation analysis of a lone justice, this Court stated:

> *Apodaca*, therefore, does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government. *See Johnson*, *supra*, at 395-396, 92 S.Ct. 1620 (Brennan, J., dissenting) (footnote omitted) ("In any event, the affirmance must not obscure that the majority of the Court remains of the view that, as in the case of every specific of the Bill of Rights

> that extends to the States, the Sixth Amendment's jury trial guarantee, however it is to be construed, has identical application against both State and Federal Governments").

130 S. Ct. at 3035 n.14.

This Court's majority has consistently held that the Sixth Amendment guarantees the right to proof beyond a reasonable doubt, and has applied these rights equally to criminal proceedings in state courts. The plurality analysis of Sixth Amendment rights presented in *Apodaca / Johnson* is not reconcilable with these majority opinions, and this Court's jurisprudence should not be home to both.

## II. Deprivations Of Liberty Based On Non-Unanimous Jury Polls Are Inconsistent With The Protections Of The Fifth, Sixth And Fourteenth Amendment.

### A. A Trial By Jury with Proof Beyond A Reasonable Doubt Protects an Accused from Government Oppression and Unreliable Convictions.

America is unique in its recognition of a constitutionally protected right to a jury for any crime which would result in a deprivation of liberty. Leib, Ethan J., *A Comparison of Criminal Jury Rules in Democratic Countries*, 50 OHIO ST. J. CRIM. L. 629, 630 (Spring 2008) ("the United States offers the jury trial

much more broadly to criminal defendants than other countries"); Dwyer, William L., *In the Hands of The People*, at xi (St. Martin's Press 2002) ("No other modern society has bet so heavily on the common man's and woman's good sense.")

The right to a criminal trial by jury has been one of the least controversial rights guaranteed by our Constitution: the right was included in the First Continental Congress's Declaration of Rights of 1774; of the twelve states that had adopted written constitutions prior to the Constitutional Convention, the right of a criminal defendant to a jury trial was the only right universally guaranteed; and the need to safeguard the right to a trial by jury was one of the "most consistent points of agreement" between the Federalists and the Anti-Federalists" at the Constitutional Convention. Alschuler & Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 870-71 (1994). The right of an accused to a jury trial is recognized as necessary to "prevent oppression by the Government." *Duncan v. Louisiana*, 391 U.S. at 155; *see also Apprendi*, 530 U.S. at 477-78 (discussing that the jury has historically been, and is perceived by the public as being, the last bastion between the criminally accused and the power of the state) (citing *United States v. Gaudin*, 515 U.S. 506 (1995)).

While the jury stands between the accused and the government, the "beyond a reasonable doubt" standard both ensures that the jury will accurately fulfill its responsibilities when deciding the fate of an

accused and encourages respect for, and confidence in, the jury's decision:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt. As we said in *Speiser v. Randall, supra*, 357 U.S. [513], at 525-526, 78 S. Ct. [1332], at 1342 [(1958)]: 'There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value – as a criminal defendant his liberty – this margin of error is reduced as to him by the process of placing on the other party the burden of * * * persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of * * * convincing the

> factfinder of his guilt.' To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' Dorsen & Rezneck, *In Re Gault and the Future of Juvenile Law*, 1 FAMILY LAW QUARTERLY, No. 4, pp. 1, 26 (1967).
>
> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

*In re Winship,* 397 U.S. at 363-364.

The questions becomes whether the jury can fulfill its fundamental functions when the opinion of a significant percentage of its members – 16% – is deemed to be irrelevant.

### B. A Lack of Unanimity Fundamentally Alters Jury Deliberation in a Manner that Undermines the Constitutionally Mandated Role of the Jury.

The lack of a unanimity requirements fundamentally impacts the conduct of a jury; empirical evidence documents that failing to require unanimity negatively affects the jury's deliberation process and the accuracy of its fact findings.

Studies of mock juries who were told they did not have to reach unanimity documented that the juries were less concerned about deliberation and more focused on getting to a verdict; such juries refused to consider the merits of the minority view, they were likely to take the first formal ballot within ten minutes of being seated as a jury and to continue to vote until they reached a verdict by the required number. *Revisiting the Unanimity Requirement*, 100 NW. U. L. REV. at 208. In marked contrast, the juries who were told they had to reach a unanimous verdict delayed their vote until after they had discussed the evidence and rated their deliberations as both more serious and more thorough. *Id.* Other studies document that when unanimity is not required, the opinions of individual jurors are disenfranchised – and members of a minority or women are the most likely to be disenfranchised. Taylor-Thompson, Kim, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1285-87, 1299-1301 (April 2000).

The lack of deliberation has a direct impact on the quality of the verdict. A lack of deliberation can negatively impact the verdict's accuracy. In one study, individuals called for jury duty were instead asked to sit as mock jurors, and viewed a video of a trial of a case that was intentionally designed by experts not to be sufficient as first degree murder, but instead of a lesser charger. Of the juries that had to deliberate until they reached unanimity, not one jury could reach a unanimous vote of first degree murder; of the juries that were allowed to reach a majority vote, 12% returned a verdict of first degree. *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. at 1273. In short, the juries that had to be unanimous more accurately analyzed the evidence, those that did not have to be unanimous were less likely to do so.

The lack of deliberation also impacts the perception of the jury's role. Juries that are unanimous report great satisfaction and confidence in their verdicts. *Revisiting the Unanimity Requirement*, 100 NW. U. L. REV. at 208. In contrast, the failure to consider all of the opinions on a jury "could undermine public confidence in the fairness of the verdicts." *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. at 1314.

### C. There is No Justification for Allowing a Lack of Unanimity in Criminal Juries.

A primary reason for allowing non-unanimous juries is a contention that those who vote "not guilty" are unreasonable, hold-out, jurors simply seeking to

cause a hung verdict. *See* Morehead, Jere W., *A "Modest" Proposal for Jury Reform: The Elimination of Required Unanimous Jury Verdicts*, 46 U. KAN. L. REV. 933, 935 (1998); Comment, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659, 675 (1997); Note, *Jury Unanimity in California: Should it Stay or Should it Go?*, 29 LOY. L.A. L. REV. 1319, 1347 (1996).

If such a concern was true, however, one would expect a plethora of hung-juries in every jurisdiction that requires unanimity. There is no reason to believe that the individuals called to state jury service in Oregon are more unreasonable than those jurors called to serve in federal courts in the same jurisdiction, or into every other court in the nation both state and federal. As Oregon has about one-third to one-half of all felony trials decided by non-unanimous jury votes, logically one would expect that one-third to one-half of every criminal case in jurisdictions requiring unanimity to suffer hung juries. In reality, hung juries are rare in all jurisdictions, with analysis finding only 2% of federal trials, and between 4% and 6% of state trials, ending in such verdicts. Reichelt, Jason D., *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J.L. REFORM 569, 582-83 (Spring 2007); *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. at 1287 n.150.

An analysis undertaken through the National Center for State Courts via a grant from the Department of Justice, found that less than 4.8% of federal trials between 1980 and 1997, and an average of 6.2% of state trials between 1996 and 1997, ended in

hung juries. *Are Hung Juries a Problem?* at 19-25.[4] While the authors of the research project considered utilizing non-unanimous juries as a solution, the recommendations rejected that option as not addressing the real problems causing hung juries – which was not unreasonable hold-out jurors:

> But it is also clear from this study that such an approach would address the symptoms of disagreement among jurors without necessarily addressing the actual causes – namely, weak evidence, poor interpersonal dynamics during deliberations, and jurors' concerns about the appropriateness of legal enforcement in particular cases. Moreover, there is empirical support that the introduction of a non-unanimous verdict rule might also affect the jury's deliberation process in unintended ways such as cutting off minority viewpoints before the jury has an opportunity to consider those opinions thoroughly. Solutions that focus specifically on the underlying causes of juror deadlock, rather than on its effects, may prove to be more effective in the long run. Possible remedies include better case selection and preparation by attorneys; better tools for jurors to understand the evidence and law; and

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[4] Available at: www.ncsconline.org/WC/Publications/Res_-Juries_HungJuriesProblemPub.pdf.

> guidance for jurors about how to conduct deliberations.

*Id.* at 86.

Frequently when a jury is unable to resolve a case, it is because they jury started out significantly divided in their view of the case – not because of a lone, irrational, dissenter. *Standing Alone*, 40 U. MICH. L.J. REFORM at 570-71 (*citing* Denise J. Devine *et al.*, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 690-707 (2001). Other empirical research confirms that, far from been unreasonable, hold-out jurists in both non-unanimous civil juries and mock criminal trial juries frequently took the same position as taken by the judges who heard the case. *Revisiting the Unanimity Requirement*, 100 NW. U. L. REV. at 229-230. Allowing non-unanimous verdicts does not solve the non-existent problem of unreasonable hold-out jurists, and cannot be justified on that basis.

Another justification cited for allowing non-unanimous juries is that majority vote is quite common in democracy – it is utilized in elections, legislative, and even in appellate judicial proceedings. *See* Amar, Akhil Reed, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1189-90 (1995). Why, then, would it not be reasonable for juries as well? Yet legislatures and judiciaries make prospective laws that bind everyone subject to that law – including the members of the legislature and the judiciary themselves. If the same or a different

legislature, or a different judicial panel, decides that the prior law was inappropriate or somehow mistaken, they can always rectify their action by a new enactment. At no point is a legislature or judicial panel obligated to determine that their enactment is appropriate beyond a reasonable doubt – and few laws could be passed or decisions reached if that was the standard. In marked contrast, the decision of a criminal jury impacts not them, but the defendant, and it cannot be revisited if the same jurors later doubt their decision. Further, the decisions controls the most fundamental interests guaranteed by our constitution – life and liberty. The standard of beyond a reasonable doubt is required to protect these fundamental interests, and a majority rule is simply not compatible with that standard. *See* Primus, Richard A., *When Democracy is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417 (January, 1997).

### D. The Doubts of 16% of a Properly Empaneled Jury Cannot Be Dismissed as Necessarily and Always Unreasonable.

Criminal juries are selected from lists of qualified individuals who make up a venire. These individuals are then questioned to discern any bias or other basis to remove them for cause, and only after each side has exercised its peremptory challenges is the petit panel duly sworn to impartially consider the evidence and apply the law. After hearing all the evidence and instructions, the panel retires to deliberate and reach a verdict. In Oregon and

Louisiana, however, the opinions of 16% of these well qualified jurors are frequently ignored.

For such a conviction to pass constitutional muster under the Sixth and Fourteenth Amendments, this Court must determine that the doubts of these 16% of the jury are necessarily, and always, unreasonable. Neither history, logic, nor empirical research, supports such a determination. As Justice Marshall wrote in dissent, joined by Justice Brennan, in *Apodaca/Johnson*:

> The doubts of a single juror are in my view evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt.

406 U.S. at 403.

A common joke among Oregon's defense bar is that if the classic *Twelve Angry Men* had been filmed here, it would have been a very short film indeed. This Court has rightly refused to apportion a mathematical number for the "beyond a reasonable doubt" standard of proof. *See, e.g., Holland v. United States*, 348 U.S. 121 (1955). Yet that is what Oregon and Louisiana are *de facto* doing, they are setting "beyond a reasonable doubt" as the conclusion of 84% of the jury.

There is simply no support, either in empirical research or at common law, to believe that the doubts of 16% of a properly constituted petit jury panel are always unreasonable. Convictions based on a jury poll which is not unanimous are convictions attained based

on a level of proof lower than beyond a reasonable doubt, and are therefore in violation of the guarantees provided by the Sixth and Fourteenth Amendments.

## CONCLUSION

For the reasons presented herein, *amicus curiae* joins with petitioner in asking this Court to accept *certiorari* on the first question, and determine whether the practice of depriving an individual of their liberty based on a non-unanimous jury poll is in violation of the protections afforded to an accused by the Sixth and Fourteenth Amendments.

Respectfully submitted,

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No. 10-344

IN THE
# Supreme Court of the United States

ALONSO ALVINO HERRERA
*Petitioner,*
*v.*

STATE OF OREGON
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF OREGON

## AMICUS BRIEF OF LOUISIANA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND ORLEANS PUBLIC DEFENDERS
**In Support of Petitioner**


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## INTERESTS OF *AMICI CURIAE*[1]

The Louisiana Association of Criminal Defense Lawyers (LACDL) is a voluntary professional organization of private and public defense attorneys practicing in the state of Louisiana. LACDL counts among its members the vast majority of the criminal defense bar in Louisiana. LACDL's mission includes the protection of individual rights guaranteed by the Louisiana and United States Constitutions and, occasionally, acting as *amicus curiae* in cases where the rights of all are implicated. LACDL is, from time to time, invited by the Louisiana Supreme Court to submit *amicus* briefs in appropriate cases.

The Orleans Public Defenders (OPD) is the largest full-time public defender office in the state of Louisiana. Its staff attorneys represent more than ninety percent of defendants in the Criminal District Court of Orleans Parish, where more than 12,000 new state cases were accepted for prosecution in 2009. Lawyers from the Orleans Public Defenders have represented criminal

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[1] Pursuant to this Court's Rule 37, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity other than amici made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified and have consented to the filing of this brief.

defendants in thousands of jury trials since this Court's decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972).

*Amici* have an interest separate from the Petitioner and Respondent in this case. *Amici* respectfully suggest that this Court consider this case along with the *petition for certiorari* now before the Court and filed in *Barbour v. Louisiana* (10-689), to determine the constitutionality of the non-unanimous jury verdict.

## INTRODUCTION

Louisiana and Oregon are the only two states to deny citizens the right to a presumption of innocence until found guilty beyond a reasonable doubt by a unanimous jury. *Amici* have seen, firsthand, that non-unanimous juries work to exclude and silence minority voices, and contribute to rushed and unreliable verdicts. *Amici* represent clients who have been, or imminently stand to be, profoundly injured by Louisiana's non-unanimous jury scheme, and who therefore have a keen interest in this Court's revisiting its fractured determination in *Apodaca*.

*Amicus* LACDL has filed briefs addressing the non-unanimous jury verdict issues presented to this Court in *Lee v. Louisiana*, no. 07-1523, and *Bowen v. Oregon*, no. 08-1117. In both pleadings, LACDL laid out the sordid history and racist motives that drove the adoption of the non-unanimous jury verdict scheme in Louisiana. *See Lee v. Louisiana*, no. 07-1523, Amicus of LACDL at 6 (noting that "we can appeal to the conscience of the nation, both judicial and legislative and I don't believe that they will take the responsibility of striking down the system which we have reared in order to protect the purity of the ballot box and to perpetuate the supremacy of the Anglo- Saxon race in Louisiana."); *Bowen v. Oregon*, no. 08-1117, *Amicus of LACDL* at 10 (detailing same history).

Those earlier filings are on file in this Court, and LACDL will not recount the entirety of that historical analysis in this brief, but rather will concentrate on the ongoing pragmatic consequences of the non-unanimous rule in Louisiana's courtrooms.

Ultimately, *amici* respectfully suggests that this Court consider, alongside Alonso Herrera's petition, the petition for certiorari now before this Court and filed in *Barbour v. Louisiana* (10-689), involving a Louisiana defendant convicted by a non-unanimous jury. Cases arising from Louisiana squarely present the troubling historical racial origins of non-unanimity[2] and the impact of the non-unanimous jury scheme in silencing minority participation.

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[2] Cf. *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) ("Without deciding whether § 182 would be valid if enacted today without any impermissible motivation, we simply observe that its original enactment was motivated by a desire to discriminate against blacks on account of race and the section continues to this day to have that effect. As such, it violates equal protection under Arlington Heights.").

## SUMMARY OF THE ARGUMENT

This Court should grant certiorari here or in *Barbour v. Louisiana*, 10-689 (response due December 27, 2010)[3] and overrule *Apodaca v. Oregon*, 406 U.S. 404 (1972).

As noted in the petitions for certiorari in *Herrera* and *Barbour*, the jurisprudential approach taken by the *Apodaca* plurality is out of step with this Court's Sixth Amendment jurisprudence: *Apodaca* focused on the functional role of the jury in contemporary society, while this Court has made clear that Sixth Amendment questions properly turn on the Framers' understanding of the applicable rights.

A*mici,* focus on a separate reason to overrule *Apodaca*. The Louisiana experience with non-unanimous juries highlights deep flaws in *Apodaca*'s fractured reasoning. *Apodaca* was wrongly decided because the plurality's central assumption – that no functional difference exists between juries operating under a unanimity requirement and those operating under a 10-2

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[3] *Amici* is informed that several other organizations including the *Charles Hamilton Houston Institute*, and the *National Association of Criminal Defense Lawyers* intend to file separate amicus briefs in that case.

decision rule – is simply incorrect, for at least two reasons.

First: Since *Apodaca* was handed down, nearly four decades of empirical research on jury decision-making has demonstrated that unanimous juries are more careful, more thorough, and more reliable, returning verdicts that are more aligned with what experienced observers of the criminal justice system view to be the correct verdict. Louisiana's experiment with non-unanimous juries has resulted in a significant number of known wrongful convictions, and continues to allow an untold number of injustices.

Second: Recent scholarship shows that one of the original purposes of non-unanimous jury schemes was to silence minority voices, and suggests that those schemes do exactly what they were intended to do. Louisiana's non-unanimous jury provision was born of an explicitly racist desire to cleanse the criminal justice system of African-American influence. The Louisiana experience shows that the non-unanimous jury scheme actually does serve to aid in the exclusion of minorities from juries – not least because non-unanimous juries allow prosecutors to better conceal the racial use of peremptory strikes – and contributes to silencing the voices of minorities on juries. Eliminating the traditional unanimity requirement marginalizes the viewpoints of

dissenting jurors because jurors in the majority refuse to deliberate further once the threshold has been reached. This effect can be particularly troubling when those holding minority viewpoints are historic victims of discrimination, including women, people of color and religious minorities.

## REASONS FOR GRANTING THE WRIT

Since this Court denied certiorari in *Lee v. Louisiana*, 07-1523 (2008) (raising the problem of Louisiana's non-unanimous jury scheme) there have been two significant and relevant developments in the case-law, both of which militate in favor of granting certiorari to revisit, and reverse, *Apodaca*. First, this Court's decision in *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010) strongly suggests that the "watered down" incorporation embraced by Justice Powell's dispositive solo opinion in *Apodaca* flies in the face of the constitutional tradition embodied in an otherwise-unbroken chain of this Court's opinions. *Id.* at 3035 (embracing the rule that "incorporated Bill of Rights protections 'are all to be enforced against the States under the *Fourteenth Amendment* according to the same standards that protect those personal rights against federal encroachment.'") (citation omitted).

Second, it has become clear that only intervention by this Court will resolve the logjam of lower court cases raising non-unanimous jury claims.[4] In *State v. Bertrand*, 2008-2214, 2008-

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[4] *See State v. Lawrence*, 2009-1637, p. 18 (La.App. 4 Cir. 08/25/2010); 2010 La. App. LEXIS 1188 at * 22 (rejecting appellant's challenge to his conviction at the hands of a non-unanimous jury) ("Suffice it to say that intermediate appellate

2311 (La. 3/17/09); 6 So.3d 738, the Louisiana Supreme Court ruled that Article 782 of the Louisiana Code of Criminal Procedure, which permits non-unanimous verdicts in certain felony cases, remains constitutional pending further action by this Court. The Louisiana Supreme Court identified *Apodaca* as controlling precedent, and emphasized that the task of reconsidering that decision rests with this Court: "[W]e are not presumptuous enough to suppose, upon mere speculation, that the United States Supreme Court's still valid determination that non-unanimous 12 person jury verdicts are

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judges, just like a trial judge, are not at liberty to ignore the controlling jurisprudence of superior courts") (internal quotation omitted); *State v. Every*, 2009-0721 (La.App. 4 Cir. 03/24/10); 35 So. 3d 410 (citing to *Bertrand* in rejecting non-unanimity challenge to non-unanimous verdict); *State v. Jones*, 2009-2261 (La.App. 1 Cir. 05/07/10); 39 So. 3d 849 (same); *State v. Moody*, 2009-1394 (La.App. 4 Cir. 04/21/10); 38 So. 3d 451 (same); *State v. Green*, 2010-0008 (La.App. 4 Cir. 11/17/10); 2010 La. App. LEXIS 1593 (same); *State v. Samuels*, 2010-0821 (La.App. 1 Cir. 10/29/10); 2010 La. App. Unpub. LEXIS 584 (same); *State v. Boudreaux*, 2008-1504 (La.App. 4 Cir. 09/29/10); 2010 La. App. LEXIS 1314 (same); *State v. Blanchard*, 2010-0014 (La.App. 1 Cir. 07/08/10); 41 So. 3d 662 (same); *State v. Martin*, 2009-1368 (La.App. 1 Cir. 10/23/09); 25 So. 3d 250 (same); *State v. Taylor*, 2009-0041 (La.App. 4 Cir. 09/04/09); 21 So. 3d 421 (same); *State v. Smith*, 09-100 (La.App. 5 Cir. 08/25/09); 20 So. 3d 501 (same); *State v. Raymond*, 08-1204 (La.App. 5 Cir. 04/28/09); 13 So. 3d 577 (same).

constitutional may someday be overturned...." 08-2214, p. 8; 6 So.3d at 743.

Following *Bertrand*, Louisiana's appellate courts have repeatedly declined to subject Louisiana's non-unanimous jury scheme to renewed scrutiny, despite mounting evidence that *Apodaca*'s foundational assumptions were flawed, and despite the emergence of a troubling historical record showing that Louisiana's non-unanimous jury scheme was born of a post-reconstruction desire to keep African-Americans out of the jury box.[5] *See, e.g.*, *State v. Thomas*, 10-220, pp. 12-13 (La.App. 5 Cir. 11/09/10); 2010 La. App. LEXIS 1549 at* 18

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[5] Nevertheless, some Louisiana judges have evidently chafed at their inability to consider arguments and evidence that were not set before this Court in *Apodaca*. *See State v. Williams*, 2009-0602 (La.App. 4 Cir. 01/27/10); 26 So. 3d 321 (Belsome, J., concurring in a judgment that denied, inter alia, appellant's non-unanimous jury claim) ("I write separately to comment regarding the historical significance of unanimous jury verdicts. Historically, a defendant could not be convicted unless the jury verdict was unanimous.... Therefore, until a further directive is given by the U.S. Supreme Court or the Louisiana Supreme Court, we are bound to follow *State v. Bertrand*...."); *State v. Barbour*, 2009-1258, p. 17 (La.App. 4 Cir. 03/24/10); 35 So. 3d 1142, 1152 (Belsome, J., concurring in an affirmation of a conviction stemming from a non-unanimous verdict) ("I write separately to acknowledge that historically, a defendant could not be convicted unless the jury verdict was unanimous.").

(rejecting non-unanimous jury claim) ("The trial court did not err in denying relator's motion to quash, since a trial judge is not at liberty to ignore the controlling jurisprudence of superior courts. *See Bertrand, supra.* Similarly, as an intermediate appellate court, this Court is obliged to follow the precedent established by the Louisiana Supreme Court.").[6] Further developments in Louisiana are unlikely absent action by this Court.

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[6] Some of the non-unanimous jury claims presented to, and rejected by, Louisiana's appellate courts in the past two years have arisen in postures that point up some of the constitutionally troubling aspects of the non-unanimous jury. *See, e.g., State v. McKnight,* 09-1186, p.6 (La.App. 4 Cir. 04/14/10); 37 So. 3d 1050, 1053 (reversing conviction handed down by non-unanimous jury for evidentiary insufficiency, and thus pretermitting discussion of appellant's non-unanimous jury claim) ("Defendant argues that his conviction by a non-unanimous jury is unconstitutional, in violation of the Sixth Amendment of the U.S. Constitution. Because we have reversed his conviction and sentence on other grounds, we pretermit discussion of this issue. We note, though, that this issue was recently addressed by this court and found to be without merit."); *State v. Jones,* 2009-0751 (La.App. 1 Cir. 10/23/09); 29 So. 3d 533 (reversing conviction of African-American defendant after 11-1 verdict of guilt, handed down by all-white jury, where trial court failed to investigate allegation that juror had been using racial slurs in jury room, but nevertheless considering – and discounting – appellant's non-unanimous jury claim); *State v. Blow,* 45,415, p. 29 (La.App. 2 Cir. 08/11/10); 2010 La. App. LEXIS 1148 at *44 ("Mrs. Blow somehow conjures up a structural defect here, in

This Court should take action in conjunction with the petitioner's application in *Barbour v. Louisiana,* (10-689) (response due December 27, 2010). As this Court acknowledged in *McDonald*, *Apodaca* is a jurisprudential anomaly: its holding is foreign to the Framers' understanding of the jury trial; it represent a solitary and unjustifiable exception to the rule that an incorporated right carries the same protections against state action as against federal action; it functions to the detriment of careful deliberation and reliable results; and its operation muzzles disenfranchised and marginalized communities.

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that the jury reached a 10-2 verdict in less than two hours. She views this split verdict and its alacrity as reflecting less than ample consideration of the case.").

## I. BOTH THE EXPERIENCE OF LOUISIANA PRACTITIONERS AND THIRTY-FIVE YEARS OF EMPIRICAL RESEARCH CAST GRAVE DOUBT ON THE *APODACA* COURT'S ASSUMPTION THAT THERE IS NO SIGNIFICANT DIFFERENCE BETWEEN THE DELIBERATIVE PROCESS AND THE SUBSTANTIVE RESULTS IN UNANIMOUS AND NON-UNANIMOUS JURIES

### *A. Empirical Research Has Shown that Unanimous Juries Are More Thorough, Deliberate More Carefully, and Arrive at More Reliable Results than Non-unanimous Juries*

With admittedly little empirical or evidentiary support other than its own hunches and assumptions, the majority in *Johnson v. Louisiana*, 406 U.S. 356, 360-61 (1972), rejected any notion that upon reaching the quorum necessary to convict, the majority jurors might simply short-circuit deliberations and ignore the reasonable doubts of their colleagues. The *Johnson* Court concluded that before it would alter its own perceptions of jury behavior and overturn a legislative judgment that unanimity is not essential to reasoned jury verdicts, "we must have some basis for doing so other than unsupported

assumptions." *Id.* at 361-62. *But see id.* at 389-90 (Douglas, J., dissenting) ("I fail to understand why the Court should lift from the States the burden of justifying so radical a departure from an accepted and applauded tradition and instead demand that these defendants document with empirical evidence what has always been thought to be too obvious for further study.").

But subsequent empirical research on jury decision-making has consistently undermined the view that non-unanimous juries can protect the jury trial guarantee. The lack of a unanimity requirement negatively affects a jury's deliberative process and the accuracy of its fact findings.

Empirical evidence shows unanimous juries are more thorough and careful than non-unanimous juries. Mock juries required to reach unanimity deliberated more thoroughly and discussed the evidence as opposed to focusing unduly on taking votes to reach the quorum. *See* Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury* 108 (1983); James H. Davis, *et al., The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds Majority Rules*, 32 J. Personality & soc. Psychol. 1 (1975) (simulated juries deliberated longer when they were required to reach a unanimous verdict as opposed to when they had to reach a two-thirds vote); Richard A. Primus, *When*

*Democracy is Not Self-Government: Toward a Defense of the Unanimity rule for Criminal Juries*, 18 Cardozo L. Rev. 1417, 1445 (1997) (arguing that the unanimity rule "forces decision makers to continue their discussions past the point where a less stringent decision rule would permit the process to end."). In contrast, studies have found that "shorter deliberations lead to less accurate judgments....[M]ajority rule discourages painstaking analyses of the evidence and steers jurors toward swift judgments that too often are erroneous or at least highly questionable." Kim Taylor-Thompson, *Empty votes in Jury Deliberations*, 113 Harv. L. Rev. 1261, 1273 (2000).

Not only do unanimous jurors deliberate longer and more thoroughly, but they are less likely to silence and marginalize minority views and dissenting jurors. *See* Valerie P. Hans, *The Power of the Twelve: The Impact of Jury size and Unanimity on Civil Jury Decision Making*, 4 Del. L. Rev. 2, (2001) (when unanimity was not required, dissenting jurors on mock juries participated less and were viewed by majority jurors as less persuasive); Shari Diamond, *et al., Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 Nw. U. L. Rev. 201 (2006) (when real juries were told that they need not reach unanimity, they were less concerned about deliberations, refused to consider the merits of the minority view, were more likely to hold a

formal vote count within ten minutes of the beginning of deliberations and continued to vote often until they reached the required majority vote for a verdict).

Finally, unanimity rules can actually shape a jury's verdict. Studies have shown how verdicts supported by a majority of the jurors at the start of deliberations were different than the verdicts actually reached after a careful, thorough deliberative process. *See* Hastie, *et al.*, *supra,* at 96-98; Valerie P. Hans *et al.*, *The Hung Jury: The American Jury's Insights and Contemporary Understanding,* 39 Crim. L. Bull. 33, 47 (2003) (finding that the defendant was ultimately acquitted 12 percent of the time in a sample of cases where the first ballot revealed a strong majority in favor of conviction).

Jurors operating under a unanimity rule report being more satisfied with their deliberations and more confident that they reached the correct result, while non-unanimous juries report lower ratings of the performance and decision processes of the other jurors. Hastie *et al.*, *supra*, at 76, 82; Diamond, *et al.*, *supra*, at 205. Perhaps most importantly, unanimity rules enhance the perceived reliability and legitimacy of criminal verdicts. *Id.* at 222, 227 (citing research indicating that "community residents viewed unanimous procedures for arriving at jury verdicts in criminal

cases as more accurate and fairer than majority procedures").

### *B. Louisiana's Experience Has Shown that Non-unanimous Juries Present an Unacceptable Risk of Rushed and Unreliable Decision-Making*

The number of individuals in Louisiana who have been exonerated after having been found guilty by a non-unanimous jury lends support to the empirical studies suggesting that non-unanimous verdicts exacerbate the risk of wrongful convictions. A study by the Innocence Project of New Orleans (IPNO) shows that 52.9% of their clients who were wrongfully convicted and incarcerated for a non-capital offense were convicted by a non-unanimous jury. IPNO has represented nine individuals in Louisiana who were wrongfully convicted and lost their liberty, family, and livelihood despite the fact that there were jurors on their respective juries with reasonable doubts as to their guilt.[7] If the

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[7] As to date, IPNO has identified 17 non-capital cases where the person was wrongfully convicted by a jury of 12 persons. Juries in eight of those non-capital cases returned a unanimous verdict whereas nine juries returned a non-unanimous verdict. IPNO has verified the unanimity/non-unanimity of the jury verdicts with the trial record in each of the 17 cases but for two, Ricky Johnson, case no. 30-770, Sabine Parish, and Willie Jackson, case no. 87-00205,

reasonable doubts of those jurors were not marginalized and silenced by the supermajority, these men may not have lost untoward number of years behind bars for crimes they did not commit:

Glenn Davis, 92-4541, Jefferson Parish
Larry Delmore, 92-4541, Jefferson Parish
Terence Meyers, 92-4541, Jefferson Parish
Gene Bibbins, 287-979, East Baton Rouge
Gerald Burge, 147-175, St. Tammany Parish
Doug Dilosa, 87-105, Jefferson Parish
Travis Hayes, 97-3780, Jefferson Parish
Rickey Johnson, 30-770, Sabine Parish
Willie Jackson, 87-00205, Jefferson Parish

While "a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt," *In re Winship*, 397 U.S. 358, 363-64 (1970), men and women in Orleans Parish are regularly condemned to prison – at times for life without the possibility of probation or parole – when at least two people on their jury had grave doubts has to their guilt. Since January 1, 2010, public defenders at the Orleans Public Defenders have tried 69 serious felony trials requiring the empanelling of a 12-

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Jefferson Parish. The information as to the non-unanimity of the jury verdict for these two cases is from their clients.

person jury. Of those 69 trials, 51 returned a verdict of guilty on at least one count or more. Sixteen juries returned a unanimous verdict of guilty whereas thirty-two[8] juries returned a non-unanimous verdict of guilty.[9] In other words, nearly two thirds of the guilty verdicts were returned by

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[8] The jury was not polled in one case, *State v. Joseph Hayes*, 490-682, where the jury returned a responsive verdict of guilt, and OPD does not have jury verdict information in two cases, *State v. Gerard Tillman*, 484-033, and *State v. Darius Adams*, 458-193.

[9] This information has been gathered by OPD from its public defenders. Non-unanimous verdicts from January 1, 2010 to November 26, 2010 are as follows:: *State v. Jamaal Tucker*, 482-303; *State v. Darryl Robinson*, 489-040; *State v. Jimil Joyner*, 468-443, *State v. Kaleigh Smith*, 475-055; *State v. David Bonds*, 478-742; *State v. Kenneth Braud*, 480-782, State *v. Ortiz Jackson*, 482-029; *State v. Cleveland Moore*, 483-891; *State v. Jimmy Warner*, 484-126; *State v. Brandon Ruffin*, 486-244; *State v. Dale Maes*, 486-334; *State v. Dexter Montgomery*, 487-738; *State v. Gregory Vincent*, 488-188; *State v. Tautus Smith*, 488-202; *State v. Terrell Holmes*, 488-362; *State v. Wilford Roberts*, 488-741; *State v. James Davis*, 489-600; *State v. George Lennis*, 490-269; *State v. Richmond Smith*, 491-314, State *v. Clifford Pierce*, 491-393; *State v. Corey Kelly*, 491-474; *State v. Ronnie Rollins*, 491-630; *State v. Kerry Cureaux*, 492-369; *State v. Leroy Jackson*, 492-704; *State v. Marcus Jackson*, 492-950; *State v. Wayne Wilson*, 493-006; *State v. Bruce Sims*, 493-278; *State v. Toliver Johnson*, 493-694; *State v. Robert Hart*, 493-808; *State v. Leonard Nellum*, 493-936; *State v. Verchaun Simms*, 494-239; *State v. Charles Harris*, 496-276.

non-unanimous juries. Simply put, on a regular basis men and women in Orleans Parish are being deprived of their liberty "when doubts of a single juror [is] evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt." *Apodaca*, 406 U.S. at 403 (Brennan, J., dissenting).

Such a high percentage of juries returning non-unanimous verdicts likely means that these juries ceased deliberations when the required quorum of ten was reached. Focusing on reaching a statutorily mandated verdict as opposed to carefully and thoughtfully sifting through all of the evidence results in truncated deliberations leading to erroneous or highly questionable verdicts.

## II. LOUISIANA'S NON-UNANIMOUS JURIES, WHICH EMERGE FROM A TROUBLINGLY RACIST HISTORY, CONTINUE TO HAVE THE EFFECT OF EXCLUDING, MARGINALIZING, AND SILENCING THE VOICES OF RACIAL AND ETHNIC MINORITIES AND WOMEN

Louisiana's majority verdict system was first introduced in the state's 1898 Constitution, as part

of a raft of measures specifically designed to "establish the supremacy of the white race."[10] Most of those measures have since been abandoned or struck down. However, the majority verdict system continues to undermine the participation of African Americans and other minorities in the criminal justice system and to tarnish the legitimacy of jury verdicts.

The pernicious effect of non-unanimous jury verdicts amplifies and is itself exacerbated by the racially-discriminatory use of peremptory challenges. In Louisiana and Oregon, prosecutors can mask discriminatory intent by accepting one or two minority jurors in the knowledge that minority votes can be marginalized by the majority verdict scheme. Discriminatory use of peremptory challenges can more easily ensure that minority jurors are effectively silenced in a jurisdiction where prosecutors need only ten votes to convict. As the drafters of Louisiana's racist 1898 Constitution were no doubt aware, where a group

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[10] From its creation, the state of Louisiana provided for the common law right to trial by jury, including unanimity in jury verdicts. By the Act of 1805, the Territory of Orleans adopted the forms and procedures of the common law of England in its criminal proceedings, including "the method of trials." Act of 1805, § 33. *See generally* A. Voorhies, *A Treatise on the Criminal Jurisprudence of Louisiana*, Bloomfield & Steel (1860), pp.3-10.

forming a majority in the community can elect the District Attorney and the judge and then form a majority quorum on the jury, the jury no longer operates effectively as a check on state power and a guarantor of the rights of minorities.

### *A. Louisiana's Majority Verdict System Was Introduced in 1898 by a Constitution Explicitly Designed to Disenfranchise and Silence the African-American Population*

Louisiana's 1898 Constitution, like the Alabama Constitution of 1901 examined by this Court in *Hunter v. Underwood*, 471 U.S. 222 (1985), "was part of a movement that swept the post-Reconstruction South to disenfranchise blacks." *Id.* at 229.

It was this 1898 Convention that for the first time broke with the Common Law tradition and encoded a rule allowing verdicts by a 9-3 majority. At the same time, the Convention further eroded the jury trial guarantee by eliminating misdemeanor juries and reducing jury sizes for lesser felonies. The proponents of those rules sometimes tried to pass them off as cost-saving devices, but commentators have directly linked the diminution of the jury trial right to the Convention's larger effort "to consolidate Democratic power in the hands of the 'right people,'

thereby bypassing the poorer sorts, just as the suffrage provision did." W. Billings & E. Haas, *In Search of Fundamental Law: Louisiana's Constitutions*, 1812-1874, The Center for Louisiana Studies (1993), pp. 93-109.

The opening address at the 1898 Louisiana Constitutional Convention made clear that the point was to limit African-American participation in the democratic process and to "perpetuate the supremacy of the Anglo-Saxon race in Louisiana." Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana, 8-9 (1898) [hereinafter "Journal"]. Closing the Convention, Hon. Thomas J. Semmes celebrated the putatively successful "mission" of the delegates "to establish the supremacy of the white race in this state." *Id.* at 374.

As noted *supra*, this sordid history is laid out in greater detail, and brought up to date, in briefing filed by *amicus* LACDL in *Lee v. Louisiana* and *Bowen v. Oregon*. The issue is squarely presented in the petition for certiorari in *Barbour v. Louisiana* (10-689), now before this Court. Suffice it to say, for these purposes, that Louisiana's provision for majority verdicts appears to have originally been motivated by an explicitly racist desire to dis-empower African-Americans. And, as discussed *infra*, the non-unanimous jury scheme continues to have the effect of silencing and

marginalizing African-American and other minority voices.

*B. Non-unanimous Jury Schemes Silence and Marginalize the Voices of African-Americans, Other Racial and Ethnic Minorities, and Women*

The system of majority verdicts in Louisiana creates the inherent risk that the voices of African-American jurors will not be respected, will not form a meaningful part of the deliberations, and may even be completely ignored. Majority verdicts create an opportunity for other jurors to return the verdict of their choosing while ignoring or discounting the views of minority jurors. This dilution of meaningful African-American participation on juries is exponentially worsened when combined with the discriminatory use of peremptory challenges by prosecutors.

As the delegates at the 1898 Louisiana Constitutional Convention understood, discriminatory intent can be masked by accepting one or two African-American jurors in the knowledge that their vote will not be fully effective in a system of majority verdicts. At the time it passed the nonunanimity rule, the 1898 Convention had before it the "Statement of Registered Voters 1897 and 1898" which is contained in the Official Journal itself. *See*

*Journal, supra*, at inserted chart. The "Statement" showed that African-Americans represented 14.7% of all citizens registered to vote in Louisiana as of January 1, 1898 (12,902 of 87,240). *Id.* Proportionate representation on juries would have seen an average of two black jurors per trial. The selection of nine votes for a verdict served to guarantee white majority control over jury verdicts – black jurors could be ignored.

Within a system of majority verdicts it becomes easier to conceal discriminatory intent in the use of peremptory challenges. At the same time, a majority verdict system makes the impact of race-based peremptory challenges more dramatic. Where a prosecutor minded to discriminate knows that he or she need only secure ten out of twelve votes to obtain a conviction, there is an opportunity to include one or two token African-American jurors. This strategy was even observed by the Louisiana Supreme Court in the case of a particularly obvious *Batson* violation:

> Because only ten votes were needed to convict defendant of armed robbery, the prosecutor could have assumed, contrary to *Batson*'s admonition that it was unacceptable to do so, that all black jurors would vote on the basis of racial bias and then purposefully discriminated by limiting the number of blacks on the jury to two. . .

> This pattern of striking all black jurors (except two) continued in the face of mounting pressure by the trial court to select a jury more representative of the black population of the parish.

*State v. Collier*, 553 So. 2d 815, 819-20 & 823 (La. 1989) (footnotes omitted). *See also State v. Cheatteam*, 07-272, p. 10 (La.App. 5 Cir. 05/27/08); 986 So. 2d 738, 745 ("[Defense counsel] pointed out that it appeared the prosecutor was attempting to ensure that only two African-Americans would serve on the jury. And in order to convict, the prosecutor needed only 10 votes.").[11]

The concern over the negative feedback-loop between non-unanimous verdicts and discriminatory use of peremptory strikes in Louisiana is not merely academic. In a large scale study of the pattern of prosecution peremptory challenges in Louisiana's Jefferson Parish – which today makes up the largest judicial district in the state – it has been shown that prosecutors

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[11] The potential for de facto silencing of minority viewpoints is not limited to Louisiana. Because white/non-Hispanic citizens comprise 80.5% of Oregon's population, the average jury will consist of two or fewer minority jurors. Thus, under a 10-2 decision rule, the voices of ethnic and racial minority jurors can be safely ignored.

peremptorily challenged African Americans at more than three times the rate at which they challenged non-African Americans.[12]

In 2003, Professor Joel Devine, of Tulane University's Center for Applied Science Research, analyzed data gathered from 390 trials involving over 10,000 prospective jurors in Jefferson Parish. Professor Devine's analysis showed that prosecutors used peremptory strikes to remove 55% of otherwise-eligible African-American prospective jurors, but only 16% of non-African American jurors in the same position. *Id.*

Researchers then analyzed the actual representation of African-Americans on Jefferson Parish juries, using the same dataset. Using a statistical tool known as a Poisson Distribution, researchers estimated the expected distribution of African-Americans on juries in a jurisdiction that is 23% African American, if the results were not racially skewed[13]:

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[12] *Blackstrikes, A Study of the Racially Disparate Use of Peremptory Challenges By the Jefferson Parish District Attorney's Office*, A Report of the Louisiana Crisis Assistance Center, (Sept. 2003), available at www.blackstrikes.com (last visited November 28, 2010).

[13] The 2000 U.S. Census recorded the African-American population at 22.9% of the Parish. Profile of General

| # of African-Americans on Jury | What It Should Be | What It Is |
|---|---|---|
| 0 | 6% | 22% |
| 1 | 17% | 35% |
| 2 | 24% | 23% |
| 3 | 22% | 12% |
| 4 | 15% | 6% |
| 5 | 8% | 1% |
| 6 | 4% | 1% |

These results suggest that as a result of the extensive use of prosecution peremptory challenges against African-Americans, the number of all white juries was more than three times what might have been expected in a jurisdiction composed of 23% African-Americans. And, where in race-neutral process 47% of juries might have been expected to have two or fewer African-Americans, fully 80% Jefferson Parish juries actually had two or fewer African-Americans – that is, so few African-Americans that their voices could effectively be discounted by the white majority.

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Demographic Characteristics 2000, U. S. Census Bureau, available at http://factfinder.census.gov/servlet/QTTable?_bm=n&_lang=en&qr_name=DEC_2000_SF1_U_DP1&ds_name=DEC_2000_SF1_U&geo_id=05000US22051 (last visited 11/28/10).

The combined effect of racially disparate use of prosecution peremptory strikes and majority verdicts is dramatic. In a system of unanimous verdicts and even handed use of peremptories, there should be only 6% of juries in Jefferson Parish in which there is no guaranteed African-American voice; that is, those cases where an all-white jury is empanelled. However, given the reality of jury selection methods and the use of majority verdicts, fully 80% of juries in Jefferson Parish have no guaranteed African-American voice.

Justice Potter Stewart warned that *Apodaca*'s rule might give rise to just such a situation, in which "[ten] jurors can simply ignore the views of their fellow panel members of a different race or class." *Johnson*, 406 U.S. at 397 (Stewart, J., dissenting); Dennis J. Devine et al., *Jury Decision making: 45 Years of Empirical Research on Deliberating Groups, 7 Psychol. Pub. Pol'y & L. 622, 669 (2001)* ("Unanimous verdicts protect jury representative-ness - each point of view must be considered and all jurors persuaded."); *id.* ("minority jurors participate more actively when decisions must be unanimous."). *Amicus* is not suggesting that all juries split on racial lines or all jurors refuse to listen to or share the views of those of other races. However, these figures dramatically illustrate the inherent potential of a system of majority verdicts to undermine the benefits of full participation and legitimacy offered by unanimous

verdicts, particularly when combined with a widespread abuse of peremptory challenges.[14]

The plurality in *Apodaca* was unwilling to accept that members of a minority group may be inappropriately silenced or disproportionately excluded in deliberations directed towards a majority verdict, rather than unanimity. But here, too, it appears that facts on the ground have thrown into doubt the premises on which *Apodaca*'s plurality based its decision. This Court has made significant efforts in recent years to ensure that jurors are not excluded from jury participation on the basis of their race or gender. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994); *Miller-El v. Dretke*,

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[14] It must be noted, too, that even if minorities hold more than two spots on any given jury, minority race and female gender are negatively correlated with juror persuasiveness and deliberation performance. *See* Hastie et al., *supra*, at 149 (finding that to the extent the juror has characteristics or experiences that are negatively linked to deliberation performance and juror persuasiveness, the more likely the juror is to be a holdout). *See also* Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 Harv. L. Rev. 1261, 1298-99 (Apr. 2000) (citing studies observing that women speak less than do men during deliberations, and that men often interrupted the women and ignored their arguments). This means that even when minorities sit on a jury, there is an increased likelihood that women and people of color may end up being outvoted by the majority of a non-unanimous jury.

544 U.S. 660 (2005); *Snyder v. Louisiana*, 128 S. Ct. 1203 (2008). But the important constitutional principles embodied in those cases are undermined when the views of women and people of color are marginalized by non-unanimous juries. The jury trial right found in the Sixth Amendment is designed to protect the individual from the oppression by the government. *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). Where a majority population can elect prosecutors and judges and then form a veto-proof quorum on a jury, the jury no longer functions as the "circuit-breaker in the State's machinery of justice." *Blakely v. Washington*, 542 U.S. 296, 306 (2004).

## CONCLUSION

Non-unanimous criminal verdicts in Oregon and Louisiana continue to undermine a critical portion of the Sixth Amendment's jury trial guarantee. *Amici* respectfully suggest that this Court consider this case along with the *petition for certiorari* now before the Court and filed in *Barbour v. Louisiana* (10-689), to grant certiorari, and reverse *Apodaca* with the benefit of full briefing on the Fourteenth Amendment issues raised by the troubling racist history behind Louisiana's non-unanimous jury scheme.

RESPECTFULLY SUBMITTED

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In The

# Supreme Court of the United States

ALONSO ALVINO HERRERA,

*Petitioner,*

v.

STATE OF OREGON,

*Respondent.*

**On Petition For A Writ Of *Certiorari***
**To The Court Of Appeals**
**Of The State Of Oregon**

## BRIEF OF OREGON CRIMINAL-LAW AND CRIMINAL-PROCEDURE PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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# BRIEF OF CRIMINAL LAW AND CRIMINAL PROCEDURE PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

## INTEREST OF *AMICI CURIAE*[1]

Pursuant to Supreme Court Rule 37.2, the undersigned seek leave to file as *amici curiae* on the Petition for Writ of *Certiorari* on whether the provision of Oregon law that permits a felony conviction based upon a nonunanimous verdict violates the Sixth Amendment right to trial by jury as applied to the states through the Due-Process Clause of the Fourteenth Amendment. Each of these *amici curiae* is a full-time law professor at an accredited law school in the State of Oregon who teaches courses and/or regularly publishes academic writings in the fields of criminal law and/or criminal procedure:

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[1] Counsel for all parties received timely notice, pursuant to Supreme Court Rule 37.2 (a), at least ten days prior to the filing of this brief, and all parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, counsel undersigned states that no counsel for any party authored this brief in whole or in part and no counsel or party made any monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

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*Amici* submit this brief to bring to the foreground of this case the scholarly consensus within the legal academic community in Oregon (1) that *Apodaca v. Oregon,* 406 U.S. 404 (1972), was wrongly decided and (2) that the empirical evidence gathered in Oregon to date strongly suggests that permitting nonunanimous verdicts of guilt violates the Sixth-Amendment right to trial by jury.

## SUMMARY OF ARGUMENT

Empirical evidence, not available at the time that *Apodaca* was decided, now overwhelmingly suggests that the requirement of jury unanimity for a guilty verdict plays a similar role as the requirement of proof beyond a reasonable doubt in protecting against wrongful convictions. *See* Richard A. Primus,

*When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries,* 18 CARDOZO L. REV. 1417 (1997).

*Apodaca* is an anachronism. In the past decade, this Court has seen significant changes in three doctrinal areas of its jurisprudence, all of which suggest that the time has come to overrule *Apodaca*. In *Apprendi v. New Jersey,* 530 U.S. 466, 498 (2000), and its progeny, this Court has recently suggested that the right to trial by jury includes a long-standing right to a conviction solely by a unanimous jury. Last term, in *Graham v. Florida,* 130 S. Ct. 2011 (2010), this Court reiterated that the determination of what process was due to a criminal defendant necessitates a consideration of society's standards, as expressed in legislative enactments and state practice to determine the national consensus regarding the practice at issue, undercutting this Court's decision in *Apodaca* to uphold a practice of questionable constitutionality that was then, and continues to be, the anomalous practice in only two of the fifty-two American jurisdictions. Also last term, in *McDonald v. City of Chicago,* 130 S. Ct. 3020 (2010), this Court held that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment'" (internal citation omitted), undercutting the central holding of the plurality opinion in *Apodaca* that a

defendant's right to a unanimous verdict applied in federal court only.[2] Any one of this Court's recent decisions, let alone the three of them standing in conjunction, dictate that this Court grant *certiorari*, overturn *Apodaca*, and hold that the Sixth-Amendment right to trial by jury, as applicable to the states via the Fourteenth Amendment, prohibits a verdict of guilt found by a less-than-unanimous jury.

## ARGUMENT

Almost forty years ago, a fractured plurality of this Court, focusing upon "the function served by the jury in contemporary society," held that the Fourteenth Amendment did not prohibit the states from securing felony convictions with less-than-unanimous verdicts. *Apodaca*, 406 U.S. at 410. Subsequent legal developments, empirical data, and the ongoing national consensus in favor of unanimity call into question the validity of this decision. Today, almost forty years later, Oregon remains one of only two states that permit felony conviction by less than a unanimous vote of the trial jury.

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[2] This argument is briefed fully in Mr. Herrera's Petition. *See* Petition for Writ of *Certiorari*, *Herrera v. Oregon*, No. 10-344, at 5-11.

## I. Post-*Apodaca* Empirical Evidence Calls Into Question the Court's Reasoning Behind Its Holding That the Right to a Unanimous Verdict Is Not So Fundamental That It Must Apply to the States via the Fourteenth Amendment.

This Court, in *Apodaca* and its companion case, *Johnson v. Louisiana*, 406 U.S. 356 (1972), addressed two interrelated issues: (1) whether the Sixth-Amendment right to trial by jury included a right to unanimity and (2) if so, whether that constitutional requirement applied to the States via the Due-Process Clause of the Fourteenth Amendment. In *Apodaca*, five justices answered the first issue affirmatively, and only four answered the second negatively (four of the remaining five justices assumed that the answer to the second inquiry was yes, but did not decide the issue because they answered the first in the negative; only one justice decided the issue in the negative). Nonetheless, because there was not a majority of the Court in agreement on both questions, the resulting holding permitted the State of Oregon to continue to accept nonunanimous verdicts of guilt in felony cases. This holding was dictated by Justice Powell's fifth vote, in which he concurred in the judgment of the plurality. Justice Powell agreed that the Sixth Amendment required a unanimous jury verdict to convict in a federal criminal trial, *see Johnson*, 406 U.S. at 371 (Powell, J., concurring in judgment), but rejected the plurality's finding that this right to a unanimous verdict was

applicable to the states via the Fourteenth Amendment. *See id.* at 369.

In reaching this conclusion, Justice Powell explicitly based his finding on the lack of empirical evidence ("no reason to believe") to demonstrate "that a unanimous decision of 12 jurors [was] more likely to serve the high purpose of a jury trial, or [was] entitled to greater respect in the community, than the same decision joined by 10 members of a jury of 12." *Id.* at 375. The majority in *Johnson* concluded that, to overturn a legislative judgment that unanimity was not essential to a reasoned jury verdict, it would need "some basis for doing so other than unsupported assumptions." *Id.* at 361-62.

The Court's concern in 1972 with the lack of empirical basis for the unanimity challenges in *Apodaca* and *Johnson* is no longer valid. A plethora of empirical evidence is now available suggesting that permitting nonunanimous verdicts of guilt negatively affects the jury's deliberation process and the accuracy of its findings. Nearly forty years of empirical research on jury decisionmaking since *Apodaca* was decided demonstrates conclusively that unanimous juries are more careful, thorough, and accurate. *See* JOHN GUINTHER, THE JURY IN AMERICA 81 (1988); REID HASTIE, *ET AL.*, INSIDE THE JURY 108 (1983) (finding that mock juries that were required to reach a unanimous verdict deliberated more thoroughly and spent more time discussing the evidence); James H. Davis, *et al., The Decision Processes of 6- and 12-Person Mock Juries Assigned Unanimous and Two-Thirds*

*Majority Rules,* 32 J. PERSONALITY & SOC. PSYCHOL. 1 (1975) (finding that simulated juries deliberated longer when they were required to be unanimous than when they were permitted to reach a verdict with a two-thirds vote); Dennis J. Devine, *et al., Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups,* 7 PSYCHOL. & PUB. POL'Y & L. 622, 629 (2001) (providing a comprehensive review of the empirical research on jury decisionmaking published between 1955 and 1999 and concluding that permitting nonunanimous verdicts of guilt have a significant effect when the prosecution's case is "not particularly weak or strong"); Shari Diamond, *et al., Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury,* 100 NW. U. L. REV. 201 (2006) (documenting that real juries that were told that they did not have to reach unanimity were less concerned about deliberation, refused to consider the merits of the minority view, were more likely to hold a formal vote count within ten minutes of the beginning of "deliberations," and continued to vote often until they reached the required majority vote for a verdict); Valerie P. Hans, *The Power of Twelve: the Impact of Jury Size and Unanimity on Civil Jury Decision Making,* 4 DEL. L. REV. 2, 23 (2001) (finding that dissenting jurors on mock juries participated less and were viewed by majority jurors as less persuasive when unanimity was not required); Norbert Kerr, *et al., Guilt Beyond a Reasonable Doubt, Effects of Conceptual Definition and Assigned Rule on the Judgment of Mock Juries,* 34 J. PERSONALITY & SOC. PSYCH. 282 (1976) (finding that dissenting jurors

operating under a majority decision rule were less likely than dissenting jurors operating under a unanimity rule to argue with majority jurors during deliberations); Charles Nemeth, *Interactions Between Jurors as a Function of Majority v. Unanimity Decision Rules,* 7 J. APPLIED SOC. PSYCH. 38 (1977) (finding that simulated juries deliberated longer when they were required to be unanimous than when they were permitted to reach a verdict with a majority vote); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?,* 6 S. CAL. INTERDISC. L. J. 1, 40-41 (1997); Kim Taylor Thompson, *Empty Votes in Jury Deliberations,* 113 HARV. L. REV. 1261 (2000) (documenting that, when unanimity is not required, dissenting jurors tend to be disenfranchised, verdicts tend to be less accurate, and public confidence in the fairness of resulting verdicts tends to be undermined). Most pertinently for the present challenge, these studies have documented that unanimity rules, standing alone, can shape the jury's verdict. *See, e.g.,* HASTIE, ET AL., *supra,* at 96-98 (documenting that, in almost one-third of the unanimous juries that they monitored, the verdict initially supported by a supermajority of the jurors was different than the verdict ultimately delivered after deliberations).

Since *Apodaca,* nonunanimous verdicts of guilt have been common in Oregon. A recent analysis of two years of felony jury-trial records by the Appellate Division of the Oregon Office of Public Defense Services indicated that nearly two thirds of the juries

who were polled reached a nonunanimous verdict on at least one count. *See* Appellate Division, Office of Public Defense Services, *On the Frequency of Non-Unanimous Felony Verdicts in Oregon* (May 21, 2009), available at http://courts.oregon.gov/OPDS/docs/Reports/PDSCReportNonUnanJuries.pdf; *see, e.g., State v. Cobb,* 198 P.3d 978, 979 (Or. App. 2008); *State v. Jones,* 196 P.3d 97, 104 (Or. App. 2008); *State v. Smith,* 195 P.3d 435, 436 (Or. App. 2008); *State v. Perkins,* 188 P.3d 482, 484 (Or. App. 2008); *Simpson v. Coursey,* 197 P.3d 68, 71 (Or. App. 2008); *Wyatt v. Czerniak,* 195 P.3d 912, 916 (Or. App. 2008); *State v. Cave,* 195 P.3d 446, 448 (Or. App. 2008); *State v. Miller,* 176 P.3d 425 (Or. App. 2008); *State v. Moller,* 174 P.3d 1063, 1064 (Or. App. 2007); *State v. Phillips,* 174 P.3d 1032, 1037 (Or. App. 2007); *State v. Norman,* 174 P.3d 598, 601 (Or. App. 2007); *State v. Rennels,* 162 P.3d 1006, 1008 n.2 (Or. App. 2007); *State v. O'Donnell,* 85 P.3d 323, 326 (Or. App. 2004).

Hung juries are rare in the overwhelming majority of jurisdictions that require unanimity. *See* Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror,* 40 MICH. J. L. REFORM 569, 582-83 (2007) (documenting that approximately two percent of federal trials and four-to-six percent of state trials nationwide end in hung juries); *see also* Thompson, *supra,* at 1287 n.50.

This Court, in assessing the contours of the right to trial by jury as it regards jury size, has indicated the importance of empirical evidence. *See Ballew v. Georgia,* 435 U.S. 223, 231 n.10 (1978) (noting that

social-science data on jury size "provide the only basis, besides judicial hunch, for a decision about whether smaller and smaller juries will be able to fulfill the purpose and functions of the Sixth Amendment"). The frequency of nonunanimous verdicts in Oregon and the infrequency of hung juries in other jurisdictions combine to suggest that jurors deliberate meaningfully to reach consensus when unanimity is required, but that they cease deliberations when a supermajority is reached when unanimity is not required. An abundance of scholarly literature documents the same. In light of the empirical data amassed since *Apodaca* was decided, this Court should reconsider its holding that the right to a unanimous jury verdict is not so fundamental that it applies to the states.

## II. This Court's Post-*Apodaca* Sixth-Amendment Jurisprudence Calls Into Question the Doctrinal Holding That the Right to a Unanimous Verdict Is Not So Fundamental That It Must Apply to the States via the Fourteenth Amendment.

Since *Apodaca*, this Court has rejected the premise of the plurality opinion that the reasonable-doubt standard was not tied to the Sixth-Amendment right to trial by jury, clarifying that "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993) (holding that Sullivan's right to trial by jury was denied because his jury was

improperly instructed about the meaning of a reasonable doubt).

More importantly, in a recent line of cases, this Court has made clear that "the longstanding tenets of common-law criminal jurisprudence" that the Sixth Amendment codifies include the guarantee that "the 'truth of every accusation' against a defendant 'should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbors.'" *Blakely v. Washington,* 542 U.S. 296, 301 (2004) (emphasis added) (internal citation omitted). *See Apprendi,* 530 U.S. at 498 (Scalia, J., concurring) (explaining that the accusations against the accused must be determined "beyond a reasonable doubt by *the unanimous vote of 12 of his fellow citizens*"); *see also Cunningham v. California,* 127 S. Ct. 856, 863-64 (2007) (incorporating the Sixth-Amendment requirement of proof of any fact that exposes a defendant to a greater potential sentence be found by a jury beyond a reasonable doubt, established in *Apprendi,* to the states); *cf. Ring v. Arizona,* 536 U.S. 584 (2002). In *Ring,* this Court explained that the holding in *Apprendi* was irreconcilable with its earlier decision in *Walton v. Arizona,* 497 U.S. 639 (1990). *See Ring,* 536 U.S. at 609-10 (concluding that this Court's "Sixth Amendment jurisprudence [could] not be home to both" *Apprendi* and *Walton*).[3]

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[3] For a thorough discussion of why *stare decisis* concerns do not justify preserving *Apodaca,* see Petitioner's Brief, No. 10-344, at 27-33.

*Apodaca* is, quite simply, an anachronism. The holding in *Apodaca,* permitting the State of Oregon to continue to accept nonunanimous verdicts of guilt in felony cases, is irreconcilable with the recent pronouncements of *Apprendi* and its progeny. Like this Court did to *Walton* in *Ring,* this Court should revisit and overturn *Apodaca* in the case *sub judice.*

## III. Since *Apodaca,* the National Consensus in Favor of Unanimous Verdicts Has Continued.

This Court has explained, in other contexts, that the "crucial guideposts" of what process is due to criminal defendants are the "history, legal traditions, and practices" of our Nation. *Washington v. Glucksberg,* 521 U.S. 702, 721 (1997) (finding that the asserted right to assisted suicide was not a fundamental liberty interest protected by the Due-Process Clause of the Fourteenth Amendment in part because there was no national consensus in protecting it). "The clearest and most reliable objective of contemporary values is the legislation enacted by the country's legislatures." *Penry v. Lynaugh,* 492 U.S. 302, 331 (1989). *See Graham,* 130 S. Ct. at 2022; *Kennedy v. Louisiana,* 128 S. Ct. 2641, 2650 (2009); *Roper v. Simmons,* 543 U.S. 551, 563 (2005); *Atkins v. Virginia,* 536 U.S. 304, 312 (2002); *Coker v. Georgia,* 433 U.S. 584, 593 (1977).

This Court's most recent case defining Eighth-Amendment standards (as applied to the States via

the Due-Process Clause of the Fourteenth Amendment) was *Graham*, in which the Court applied its categorical approach to the Cruel-and-Unusual-Punishment Clause for the first time in a context outside of imposition of the death penalty. *See id.* at 2022. The Court should use the present case to accord significant respect to national consensus and interpret the jury trial guarantee, "like other expansive language in the Constitution, . . . according to its text, by considering history, tradition, and precedent, and with due regard for its purpose in the constitutional design." *Roper*, 543 U.S. at 560.

This Court has previously looked to the practices of the states in determining the minimum number of jurors required by the Sixth-Amendment right trial by jury:

> It appears that of those States that utilize six-member juries in trials of non-petty offenses, only two, including Louisiana, also allow non-unanimous verdicts. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.

*Burch v. Louisiana*, 441 U.S. 130, 138 (1979) (internal citations omitted).

In the almost forty years since this Court decided *Apodaca*, no States have heeded its siren call to permit nonunanimous verdicts in felony cases. On the contrary, a consensus against their use remains, and

Oregon remains one of only two states that permit a defendant to be convicted of a felony by a less-than-unanimous verdict. *See* Diamond, *et al., supra,* at 203.

This Court has also recently noted, in the context of the right to effective assistance of counsel, that it has long referred to the American Bar Association ("ABA") Standards "as guides to determining what is reasonable." *Rompilla v. Beard,* 545 U.S. 374, 387 (2005) (internal quotations omitted). The ABA Standards, on which Justice Powell relied in his concurring opinion in *Apodaca,* have been amended since *Apodaca* was decided to require unanimity in all criminal jury trials. *See* ABA Standard Relating to Trial Courts 2.10 (1976) ("The verdict of the jury [in criminal cases] should be unanimous.") (abrogating ABA Standard for Criminal Justice, Trial by Jury 1.1 (d) (1968) (approving of "less-than-unanimous verdicts, without regard to the consent of the parties")); ABA Principles for Juries & Jury Trials 4 (B) (August 2005) ("A unanimous decision should be required in all criminal cases heard by a jury."). The Commentary to Trial-Court Standard 2.10 concludes: "If the question of jury trial in criminal cases is considered from a long range viewpoint, placing the present exigencies of the trial courts in proper perspective, the[ ] qualifications [in Criminal Justice Standard 1.1 (d) for less-than-unanimous verdicts] appear to be both unnecessary and unwarranted by our legal traditions." The Comment to Jury Principle 4 states:

> At least as early as the fourteenth century it was agreed that jury verdicts should be unanimous. . . . The historical preference for unanimous juries reflects society's strong desire for accurate verdicts based on thoughtful and thorough deliberations by a panel representative of the community. Implicit in this preference is the assumption that unanimous verdicts are likely to be more accurate and reliable because they require the most wide-ranging discussions – ones that address and persuade every juror.

Commentary to ABA Jury Principle 4 (internal citations omitted).

## CONCLUSION

This case requires this Court to answer a fundamental question of criminal procedure: what is a hung jury? Is it an anomaly, a breakdown in the system, a failure of *voir dire* and jury selection to eliminate one or two individual jurors whose personal biases preclude their ability to reach a reasonable conclusion based on the evidence, the result of instructional error or confusion? *See, e.g., Johnson,* 406 U.S. at 377 (Powell, J., concurring in judgment) (positing that permitting nonunanimous verdicts could minimize the potential for "hung juries occasioned either by bribery or juror irrationality"); Jere W. Morehead, *A "Modest" Proposal for Jury Reform: The Elimination of Required Unanimous*

*Jury Verdicts,* 46 KAN. L. REV. 933, 935 (1998) (contending that those who vote "not guilty" are unreasonable, hold-out jurors, simply seeking to hang the jury). Or is it a referendum on the weight of the evidence presented by the prosecution, an indication that, in the particular case *sub judice,* reasonable minds could disagree on the existence of a reasonable doubt, a tool to stimulate meaningful deliberation, a bulwark against wrongful conviction? *See Apodaca,* 406 U.S. at 403 (Brennan, J., dissenting) ("The doubts of a single juror are . . . evidence that the government has failed to carry its burden of proving guilt beyond a reasonable doubt."); Thompson, *supra,* at 1317 (documenting that juries rarely hang because of one or two obstinate jurors). *Apodaca* only makes sense if a hung jury is the former. Because, if a hung jury is a natural, necessary, and desired byproduct of a system of lay participation in fact finding, then this Court should not permit a serious criminal conviction that is not based upon the unanimous finding of guilt by all twelve jurors. Nonetheless, the empirical evidence suggests that a hung jury is the latter. *See* Devine, *et al., supra,* at 690-707 (documenting that, when a jury is unable to reach a unanimous verdict, it is usually because the jurors began deliberations significantly divided in their views of the case and not because of a lone, irrational dissenter); Diamond, *supra,* at 205, 220, 229-30 (documenting that "hold-out" jurors in nonunanimous civil juries and mock criminal juries were not irrational or eccentric but rather viewed the judge's instructions and recalled the testimony in much the same way as the majority

jurors and frequently shared the same assessment of the case as the trial judge); Thompson, *supra,* at 1317 (finding that juries rarely hang because of one or two obstinate, "holdout" jurors).

As then-Judge Kennedy so eloquently expounded: "A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict." *United States v. Lopez,* 581 F.2d 1338, 1341 (9th Cir. 1978) (Kennedy, J.).

For the reasons presented herein, *amici curiae* join Mr. Herrera in asking this Court to grant *certiorari,* overrule *Apodaca,* and hold that the practice of depriving an individual of his or her liberty on the basis of a nonunanimous verdict of guilt violates the rights to trial by jury and due process protected by the Sixth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

ALONSO ALVINO HERRERA,
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v.

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*Respondent*.

**On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon**

## BRIEF OF *AMICUS CURIAE* PROFESSOR KATE STITH

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## BRIEF OF *AMICUS CURIAE* PROFESSOR KATE STITH

## INTEREST OF *AMICUS CURIAE*[1]

Kate Stith is the Lafayette S. Foster Professor of Law at Yale Law School. She has written extensively on criminal law and procedure, including on the Sixth Amendment.

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of *Amicus Curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae* or her counsel made a monetary contribution to the brief's preparation or submission.

Professor Stith also has served as a member of the Advisory Committee on the Federal Rules of Criminal Procedure of the Judicial Conference of the United States (1995-2001), on the Committee on Law and Justice of the National Research Council (1997-2002), and as an Adviser for the Model Penal Code: Sentencing project of the American Law Institute (2002-present).

Professor Stith has an interest in ensuring that criminal justice processes in the United States meet the requirements set forth in the United States Constitution, and in particular that the criminal petit jury is available in all cases to perform its constitutionally ordained roles.

## REASONS FOR GRANTING THE PETITION

In *Apodaca v. Oregon*, 406 U.S. 404 (1972), the Supreme Court upheld the 1934 amendment to the Oregon Constitution allowing non-unanimous juries in all criminal cases except those charging first-degree murder. Since *Apodaca*, the Court's methodologies for interpreting the provisions of the Sixth Amendment, and for determining the applicability of those protections to the States through the Due Process Clause of the Fourteenth Amendment, have changed considerably. In at least four respects, the result in *Apodaca* is inconsistent with these jurisprudential developments and other subsequent events.

First, in *Apodaca*, the four-Justice plurality (White, J., joined by Burger, C.J., and Blackmun and Rehnquist, JJ.), adopted a functional approach to interpretation of the jury-trial right in the Sixth Amendment. The plurality concluded that even though the requirement that a jury verdict be unanimous arose during the Middle Ages and was

"an accepted feature of the common-law jury by the 18th century," the unanimity requirement "was not of constitutional stature." 406 U.S. at 406-408. This plurality considered the primary function served by the criminal petit jury as "the commonsense judgment of a group of laymen," 406 U.S. at 410 (citing *Williams v. Florida*, 399 U.S. 78, 100 (1970)), and concluded that in serving this function there is "no difference between juries required to act unanimously and those permitted to convict or acquit by votes of 10 to two or 11 to one." 406 U.S. at 411.

By contrast, the Court has now concluded that the Sixth Amendment derives its meaning primarily from the original understanding at the time the provision was adopted, not from a functional assessment of the provision's purpose. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court rejected its previously articulated, reliability-based understanding of the Confrontation Clause and instead adopted the conception of the right known to the Framers, looking to practice at common law.

Similarly, in *Blakely v. Washington*, 542 U.S. 296, 313 (2004), the Court emphasized that "our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice"; rather, the relevant inquiry is "the Framers' paradigm for criminal justice."

In sum, the *Apodaca* plurality's examination of the "function" of the jury trial is not the approach that a majority of the Court has adopted in recent cases interpreting the Sixth Amendment. Looking to the understanding at the time the Bill of Rights was adopted yields the conclusion that unanimity is a requirement of the Sixth Amendment right to a jury trial. Even the *Apodaca* plurality recognized that at

that time, unanimity was a critical characteristic of the petit jury.

Second, the *Apodaca* plurality believed that "the Sixth Amendment itself has never been held to require proof beyond a reasonable doubt in criminal cases. The reasonable-doubt standard developed separately from both the jury trial and the unanimous verdict." 406 U.S. 411 (citing *In re Winship*, 397 U.S. 358, 361 (1970)).

Yet the Court has since held, unanimously, that "the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt." *Sullivan v. Louisiana*, 508 U.S. 275, 278 (1993). Further, in *Apprendi* and its progeny, this Court "has repeatedly held that under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt * * *." *Cunningham v. California*, 549 U.S. 270, 281 (2007) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

In sum, the *Apodaca* plurality's dismissal of any relationship between the Sixth Amendment's jury-trial right and the standard of proof beyond a reasonable doubt has since been rejected by the Court. Indeed, the present understanding seems to be that the reasonable doubt standard is effectively part of the Sixth Amendment right to a jury trial. This strongly suggests that unanimity, which helps safeguard that standard, is also a part of the right itself.

Third, eight Justices in *Apodaca* (the majority plurality—consisting of Justice White and those joining his opinion—and the four Justices in the minority plurality) agreed that the right to a jury trial applies to the States, through the Fourteenth

Amendment, identically as it applies to the United States. There was a bare majority to uphold Oregon's constitutional provision allowing non-unanimous verdicts only because one member of the Court, Justice Powell, believed that the Fourteenth Amendment did not require that the federal constitutional rule apply in all respects to the States. *See Johnson v. Louisiana*, 406 U.S. 356, 395 (1972) (Brennan, J., dissenting). As the Court recently noted in *McDonald v. City of Chicago*, "that ruling [in *Apodaca*] was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation." No. 08-1521 (June 28, 2010), slip op. 18 n.14.

Most significantly, *McDonald* held that "incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *Id.* at 17-18 (internal citation omitted). This had been the judgment of eight Justices in *Apodaca*, and in *McDonald* only one Justice expressed the contrary view, *see* No. 08-1521 (June 28, 2010), slip op. 7-13 (Stevens, J., dissenting).

In sum, the result in *Apodaca*, whereby the provisions of the Bill of Rights may be applied differently to the States and to the federal government, has been rejected by a substantial majority of the present Court. Under the approach to incorporation set forth in *McDonald*, the jury unanimity requirement, which has been held by the Court to be mandated by the Sixth Amendment against the federal government, *see Andres v. United States*, 333 U.S. 740 (1948), should also be enforced against the States.

Fourth, the actions (and non-actions) of the States since *Apodaca* lend support to the understanding that a unanimous criminal jury is fundamental to our constitutional order, unlike other aspects of the Bill of Rights that have not been incorporated to apply to the States. After *McDonald* there remain three federal Bill of Rights protections that have not been incorporated against the States: the right to a grand jury indictment (*Hurtado v. California*, 110 U.S. 516 (1884)), the right to a jury trial in a civil case (*Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U.S. 211 (1916)), and the right to a unanimous jury verdict in a criminal case (*Apodaca/Johnson*). *McDonald* discussed these three exceptions.

*McDonald* observed that after the *Hurtado* decision, almost all States stopped using a grand jury as an exclusive means to indict. After the *Minneapolis & St. Louis* decision, States established small claims courts without a jury trial right. No. 08-1521 (June 28, 2010), slip op. 7-13 (plurality opinion). By contrast, after *Apodaca/Johnson*, no State abolished the right to a unanimous jury verdict in a non-petty criminal case. In fact, one State—Oklahoma—which at the time of *Apodaca* had allowed non-unanimous juries for misdemeanors, altered its law in 1989 to require unanimous juries in all cases where the Sixth Amendment right to a jury trial applies (that is, in all but "petty offense" cases). *See* 1989 Okla. Sess. Law. Serv. Sen. Jt. Res. 17 (West), enacted as OKLA. CONST. art. II, § 19. Oregon and Louisiana thus remain unique. But even in Oregon, when the voters were recently given the opportunity to abolish that State's only remaining unanimity requirement, in first-degree murder cases, they declined to do so.

*See* 1999 Ballot Measure 72.[2] This history strongly suggests that the people of this Nation understand the right to a jury trial to include the right to a verdict agreed to by *all* the jurors.

Finally, *Amicus* urges that the Court not be deterred by efficiency concerns, as the criminal jury is not intended to be maximally efficient or to perform as we expect modern bureaucracies to perform. The Court has observed:

> Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury.

*Blakely v. Washington*, 542 U.S. at 313.

Similarly, one Justice previously explained:

> The founders of the American Republic were not prepared to leave it [criminal justice] to the State, which is why the jury-trial guarantee was one of the least controversial provisions of the

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[2] Ballot Measure 72 was defeated at the polls in 1999: Yes 316,351; No. 382,685. *See* OREGON SECRETARY OF STATE, http://www.sos.state.or.us/elections/nov299/m72abs.html (last viewed Nov. 29, 2010).

> Bill of Rights. It has never been efficient; but it has always been free.

*Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

More generally, as *Amicus* has previously noted:

> [W]e should be cautious in adopting modifications that alter or remove features of the jury once thought to be fundamental. * * * [A]bolition of peremptories and of the unanimity requirement, and opening up jury deliberations to greater press, public, and appellate scrutiny are some of the "reforms" that may be urged upon us in the coming years in response to irrepressible demands for greater equality, rationality, and accountability. * * * [But] we would do well to consider the possibility that, at its core, the jury is an institution that will never harmonize well with certain values that are preeminent in the modern age. The jury's greatest contribution may be precisely that it tempers those values with the competing values of intuition, common-sense, lay judgment, anonymity, and secrecy.

Kate Stith-Cabranes, *The Criminal Jury in Our Time*, 3 VA. J. SOC. POL'Y & L. 133, 145 (1995).

The *Apprendi/Blakely* line of cases is based on a deeply rooted tradition of protecting the jury as a bulwark against government power. Jury verdicts can produce aberrational results, and jury trials are not models of efficiency. But the point of a jury verdict is that it is a verdict by a jury. And unanimity has been a traditional feature of a jury verdict, as acknowledged in *Apodaca*.

In sum, this Court, the 48 States that retain the unanimity requirement, and even the people of Oregon (with respect to murder cases) have all recognized that the requirement of unanimity is a fundamental aspect of the right to a jury trial in criminal cases.

## CONCLUSION

For these reasons, the Court should issue a writ of certiorari to review the judgment and decision of the Oregon Court of Appeals in this case.

Respectfully submitted,

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